

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



75-1396

OR  
IG  
N  
AL

B  
P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

DOCKET NOS.:

-against-

75-1396

MARCUS GEORGE HERO,

75-1397

75-1398

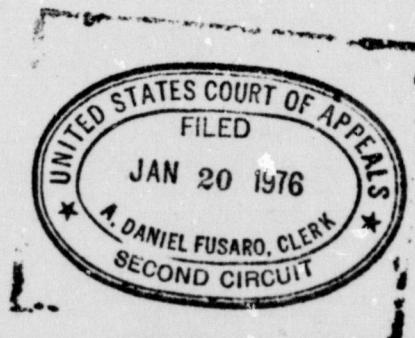
Defendant-Appellant.

-----x

APPELLANT'S APPENDIX

MARTIN E. GOTKIN  
Attorney for Defendant-Appellant  
250 West 57th Street  
New York, New York  
(212) 541-8390

JULIA P. HEIT  
Of Counsel



3

PAGINATION AS IN ORIGINAL COPY

APPENDICES

Docket Sheets	A-1
Indictment (74 Cr.1055) Mini Enterprises	A-4
Indictment ( 74 Cr.1053) North State	A-12
Indictment (74 Cr. 1051) Modern Century	A-19
Charge	A-26

## DOCKET SHEETS

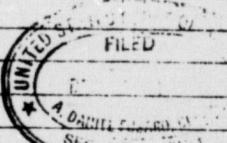
11/25

D. C. Form No. 104  
CRIMINAL DOCKET

340-105

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U.S.: George E. Wilson, AUSA
1. LEONARD RANDELL	vs.	791-1952
2. GERALD DEVINS		
3. MARCUS GEORGE HERO		
4. GORDON M. SAKS		
		For Defendant:
(2) Bernard Jay Coven		
47 Third Ave, NYC 10017		
758-7690		

AUTH. OF CTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
10/5					
Fines,					
C.R.,					
Journal, 4/23					
Attorneys,					
Former Lawyer's Court,					
Business,					
10/10/74 False statements to S.B.A. (Cr. 2)					
10/10/74 False statements re my bank. (Cr. 3)					
10/12/74 Consp. to do. (Cr. 1)					
(Other Courts)					



DATE	PROCEEDINGS
10/10/74	Filed Indictment and ordered sealed. Capodilupo, J.
10/10/74	Indictment ordered sealed. Motzner, J.
10/12/74	Setting before Devins and Randell (Attys. present). Plead not guilty. Bail fixed in 74cr1055 at 10,000, P.R.B. secured by \$1,000, cash or the alternative to be assigned by a responsible person to cover this indictment also. Offrs. arrested, photographed and fingerprinted.
10/12/74	Officer (Officer, person) Pleads not guilty. Bail fixed in 74cr 778 at \$10,000, P.R.B. to cover this indictment also.
10/12/74	Case adjourned to 12/18/74. Capodilupo as a related matter. Carter, J. presiding;
10/10/74	Filed copy of P.R.B. in the amt. of \$10,000, dtd. 10/10/74.

A-1

Page 2 Judge Gagliardi

74 Cr. 1971

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1/17/75	Filed notice of appearance by atty. for G. Devine.		
1/17/75	Filed notice of opposition to deft.'s motion to dismiss.		
1/17/75	Deft. filed notice of appearance by atty. for L. Randell.		
1/17/75	Filed notice of opposition to deft.'s motion to dismiss.		
1/20/75	Deft., L. Randell - filed motion & affdv. re: DISMISSAL ret: 1/22/75.		
1/23/75	Filled Govt.'s affdv. re: opposition to deft.'s motion to dismiss.		
1/25/75	Filled Govt.'s bill of particulars. (also in 1053,1054,1055)		
1/25/75	Filled Govt.'s suppl. bill of particulars. (also in 1055)		
1/25/75	Filed deft., L. Randell's notice of motion re: severance, etc.		
1/25/75	Cordon Saks - (atty. present) deft. withdraws plea of not guilty and now pleads guilty to count 1 only. Pre-sentence investigation ordered for setence 05-07-75 at 9:30. Deft. cont'd. on present bail until date of sentence. Gagliardi,J.		
1/26/75	Filed ORDER that Harry L. Jaffee, M.D. is employed to examine deft. L. Randell to determine his physical capacity to stand trial, etc. Gagliardi,J. (certified copies delivered to U.S. Marshal) (also in 74 Cr. 1055).		
1/26/75	Filed notice of appearance of atty. for deft. G. Devine - Bernard Jay Coven, P.C.		
1/17/75 1/18/75	Before Judge Gagliardi jury trial began as to deft. Marcus George Hero. Trial cont'd.		
1/19/75	" "		
1/20/75	" "		
"	" "		

A-2

DATE	PROCEEDINGS
01-24-75	Trial cont'd.
01-25-75	" "
03-26-75	" "
03-27-75	" "
03-28-75	" "
03-31-75	" "
04-01-75	" " and concluded. Jury verdict deft. guilty on counts 1, 2, & 3. Pre-sentence investigation ordered. For sentence 5-22-75 at 10. Deft. cont'd on present bail until date of sentence. Bail limits extended to cover New York, New Jersey and Conn. Gagliardi, J.
04-17-75	Filed true copy of order docketed 3-12-75.
04-18-75	Filed transcript of record of proceedings, dated Mar 31, Apr 1, 1975.
04-18-75	Filed transcript of record of proceedings, dated Mar 18, 19, 20, 21, 1975.
04-18-75	Filed transcript of record of proceedings, dated Mar 24, 25, 26, 27, 1975.
05-22-75	G. Devins and L. Mandell-filed Govt.'s notice of readiness for trial.
05-17-75	Filed Govt.'s suppl. bill of particulars(also 1053,1054&1055)
05-17-75	Filed Govt.'s request to charge.(also 1053,1054 & 1055)
05-17-75	Filed deft. Devins affdvt. re: support of appl. for adjournement of trial. (also 1052 & 1055)
05-17-75	Filed transcript of record of proceedings, dated 3-11-75.
10-03-75	Filed Stip. & Order re: sentencing of deft. Gerald Devins. Gagliardi, J. (also in 74 Cr. 1052,74 Cr. 1055 and 75 Cr. 544)
11-17-75	GORDON M. SAKS-(atty. present) Filed Judgment- count 1-9 mons. impr. CONCURRENTLY with sent. imposed this date on 74 Cr.778. Counts 2 & 3 are dismissed on deft.'s motion, noobjection by the Govt. Deft. to surrender to U.S. Marshal on 12-1-75 at -10:30AM. Deft. is cont'd. on present bail until date of surrender. Gagliardi, J. issued all copies.
11-18-75	MARCUS GEORGE HERZ (atty. present) Filed judgment- 6 mons. impr. each of counts 1,2 & 3 conc. Deft. is placed on probation for a per of 1 year to follow service of sentence and conc. with sent. imposed on indictments 74 Cr. 1053 and 74 Cr. 1055. Deft. is cont'd. on present bail pending appeal. Gagliardi, J. issued all copies.
11-19-75	Marcus George Herz-filed notice of appeal from judgment of 11-18-75. mailed copies to U.S. Atty. & Deft.'s atty.

A TRUE  
RECORD*M. Jnl*

A-3

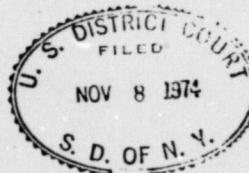
INDICTMENT (74 CR. 1055)  
MINI ENTERPRISES

EW:ap

74 CRIM. 1055

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :  
-v- : INDICTMENT  
MARCUS GEORGE HERO, GERALD DEVINS : 74 Cr.  
and LEONARD RANDELL,  
Defendants. :  
-----x



The Grand Jury charges:

1. From on or about October 1, 1972, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, MARCUS GEORGE HERO, GERALD DEVINS and LEONARD RANDELL, the defendants, and Salvatore Catalanotto, a/k/a Sal Catalle (hereinafter referred to as "Sal Catalle"), named as a co-conspirator but not as a defendant, unlawfully, wilfully and knowingly, did combine, conspire and confederate and agree together and with each other and with persons to the Grand Jury known and unknown to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions, by obstructing and hindering the United States Small Business Administration in administering the Small Business Act, Title 15, United States Code, Section 631 et seq., and to violate Title 18, United States Code, Sections 201, 1001 and 1014 and Title 15, United States Code, Section 645(a).

MICROFILM  
DEC 5 1974

4-4

(1)

2. It was a part of said conspiracy that the defendants and their co-conspirators would and did agree to defraud the United States of its lawful right to have the United States Small Business Administration guarantee a bank loan in the manner and for the purposes provided by Section 7(a) of the Small Business Act as amended, fairly and unpartially without undue influence, unlawful inducement, false representation, favor or fraud, in that the authorization for said guaranty was subject to, and based upon a borrower's loan application, which was false, fictitious and fraudulent; and that the defendants and their co-conspirators misapplied the proceeds of the loan.

3. It was further a part of said conspiracy that the defendants, and their co-conspirators in matters within the jurisdiction of a department and agency of the United States, the United States Small Business Administration, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts and did make and cause to be made, false, fictitious and fraudulent statements and representations, and would and did make and use and cause to be made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

4. It was further a part of said conspiracy that the defendants and their co-conspirators would and did unlawfully, wilfully and knowingly make and cause to be made false statements and reports and overvalue property and securities, for the purpose of influencing the action of the Underwriters Bank and Trust Company (since renamed United Americas Bank), (hereinafter "Underwriters"), a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon an application for a loan and a loan, that is a loan for \$350,000.00 to Mini Enterprises, Inc. (hereinafter "Mini").

5. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly would, and did make and cause to be made false statements and intentionally overvalue and cause to be overvalued a security in an application filed with the United States Small Business Administration for the purpose of obtaining for themselves and others a guarantee by the United States Small Business Administration of 90% of the amount of a bank loan to Mini.

6. It was further a part of said conspiracy that defendants and their co-conspirators, unlawfully, wilfully and knowingly, would directly and indirectly, corruptly give, offer and promise and cause to be given, offered and promised, things of value to public officials, that is, officers of the United States Small Business Administration with intent to influence official acts

A-4

of said public officials; to influence said public officials to commit and aid in committing and collude in and allow a fraud and make opportunity for the commission of a fraud on the United States; and to induce said public officials to do and omit to do acts in violation of their lawful duties.

7. It was further a part of said conspiracy that defendants and their co-conspirators would unlawfully, wilfully and knowingly, otherwise than as provided by law for the proper discharge of official duties, directly and indirectly give, offer and promise things of value to public officials, that is, officers of the United States Small Business Administration, for and because of official acts performed and to be performed by said public officials.

8. Among the means whereby the defendants would and did carry out said conspiracy were the following:

(a) In or about October 1972 co-conspirator Sal Catale an accountant, would allow his dormant corporation, Mini Enterprises, Inc. (hereinafter "Mini"), to be used to obtain a \$350,000.00 loan 90% of which was to be guaranteed by the United States Small Business Administration (hereinafter "S.B.A.").

(b) Defendant, MARCUS GEORGE HERO, a financial consultant and former employee of the S.B.A.; the defendant GERALD DEVINS, an accountant, the defendant

LEONARD RANDELL, the president of Small Business Electronics Investment Company, a Small Business Investment Company; and co-conspirator Sal Catale, would prepare and cause to be prepared a S.B.A. loan application for \$350,000.00 for Mini, which was to be submitted to Underwriters.

(c) The loan application would falsely show that Mini had been engaged for several years in extensive research in the field of smoking diseases and their deterrence and had developed marketable vitamins and diet-aid products in this area.

(d) A balance sheet for the period ending September 30, 1972 showing a net worth of \$79,000 was fabricated.

(e) Collateral in the amount of \$174,250 was offered which was either overvalued, non-existent or in which Mini had no right, title or interest.

(f) A total of \$70,000 would be paid to defendants MARCUS GEORGE HERO, GERALD DEVINS and LEONARD RANDELL, co-conspirator Sal Catale and others for their services in connection with obtaining the loan, without disclosure of these payments to the bank or to the S.B.A.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed by the defendants and their co-conspirators in the Southern District of New York and elsewhere:

1. On or about October 30, 1972, MARCUS GEORGE HERO, GERALD DEVINS, LEONARD RANDELL and Sal Catale had a meeting.

A.Y

2. On or about October 31, 1972, Sal Catale submitted an application for a \$350,000 loan to Underwriters at 50 Broadway, New York, New York.

3. On or about December 8, 1972, Sal Catale went to Underwriters at 50 Broadway, New York, New York, for the purpose of receiving the \$350,000.00.

COUNT TWO

The Grand Jury further charges:

On or about November 22, 1972, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit: the United States Small Business Administration, MARCUS GEORGE HERO: GERALD DEVINS and LEONARD RANDELL, the defendants, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and caused to be falsified, concealed and covered up, by trick, scheme and device material facts, and did make and caused to be made false, fictitious and fraudulent statements and representations and did make and caused to be made and use and caused to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendants, MARCUS GEORGE HERO, GERALD DEVINS and LEONARD RANDELL submitted and caused to be submitted to the United States Small Business Administration, an application for a \$350,00 loan by Mini Enterprises, Inc. of 230 Park Avenue, New York, New York, (hereinafter "Mini"), to be guaranteed by the United States

A. S

Small Business Administration in which it was represented that Mini had been engaged in extensive research into the effects of giving up smoking and had developed a diet-aid pill; that the total amount of shareholders equity and net worth in Mini as shown on a balance sheet dated as of September 30, 1972 was \$79,000; and that no attorney, accountant, appraiser, agent or any party engaged by or on behalf of Mini had received or was to receive any fee, or other charge or compensation whatever for the purpose of rendering professional or other services of any nature whatever in connection with the preparation or presentation of said loan application, when in truth and in fact as the defendants then and there well knew said statements and documents were untrue.

(Title 18, United States Code, Section 1001 and 2)

COUNT THREE

The Grand Jury further charges:

On or about October 31, 1972, in the Southern District of New York, the defendants, MARCUS GEORGE HERO, GERALD DEVINS, LEONARD RANDELL, unlawfully, wilfully and knowingly did make and caused to be made a false statement and report for the purpose of influencing the actions of Underwriters Bank and Trust Company (since renamed United Americas Bank), a bank the deposits of which were then insured by the Federal Deposit Insurance

EW:ap

Corporation, upon an application and loan for \$350,000 by  
Mini Enterprises, Inc. (hereinafter "Mini") in that  
defendants represented or caused to be represented to said  
bank that no attorney, accountant, appraiser, agent or any  
party engaged by or on behalf of Mini had received or  
was to receive any fee, or other charge or compensation  
whatever for the purpose of rendering professional or  
other services of any nature whatever in connection with  
the preparation or presentation of said loan application  
when in truth and in fact as the defendants then and there  
well knew said representations were untrue.

(Title 18, United States Code, Sections 1014 and 2)

Mike Shew  
FOREMAN

Paul J. Curran  
PAUL J. CURRAN  
United States Attorney

Werner Goodman  
Deputy Clerk

A-11

GEW:ap

INDICTMENT (74 Cr. 1053)  
NORTH STATE

74CRIM. 1053

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

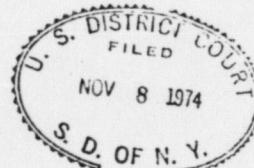
-v-

MARCUS GEORGE HERO,  
GORDON M. SAKS, a/k/a  
George Saunders,

Defendants. :

INDICTMENT

74 Cr.



The Grand Jury charges:

1. From in and around August 1973 up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, MARCUS GEORGE HERO and GORDON M. SAKS, a/k/a George Saunders (hereinafter referred to as Saks), the defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together and with each other and with others to the Grand Jury known and unknown to defraud the United States and its departments and agencies, to wit, the United States Small Business Administration in connection with the performance of its lawful governmental functions by obstructing and hindering the administration of the Small Business Act, Title 15, United States Code, Section 631 et seq., in carrying out the declared policy of Congress that the Government should aid, counsel, assist and protect, insofar as it is possible the interests of small business concerns in order to insure free competitive enterprise and to maintain and strengthen the overall economy of the nation;

MICROFILM

DEC 5 1974

A-2

(1)

and to violate Title 18, United States Code, Sections 201, 1001 and Title 15, United States Code, Section 645(a).

2. It was a part of said conspiracy that defendants and their co-conspirators would unlawfully, wilfully and knowingly, directly and indirectly, corruptly give, offer and promise and cause to be given, offered and promised, things of value to public officials, to wit, officers of the SBA, with intent to influence official acts of said public officials, to influence said public officials to commit and aid in committing and collude in and allow a fraud and make opportunity for the commission of a fraud on the United States, and to induce said public officials to do and omit to do acts in violation of their lawful duties.

3. It was further a part of said conspiracy that defendants and their co-conspirators would unlawfully, wilfully and knowingly, otherwise than as provided by law for the proper discharge of official duties, directly and indirectly give, offer and promise things of value to public officials, to wit, officers of the SBA for and because of official acts performed and to be performed by said public officials.

4. It was further a part of said conspiracy that the defendants, and their co-conspirators in matters within the jurisdiction of a department and agency of the United States, that is, the United States Small

Business Administration, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up and cause to be falsified, concealed and covered up by trick, scheme and device material facts and make and cause to be made, false, fictitious and fraudulent statements and representations and would make and use and cause to be made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

5. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly would and did make and cause to be made false statements and intentionally overvalue and cause to be overvalued securities in an application filed with the United States Small Business Administration for the purpose of obtaining for themselves and others loans from the Small Business Administration.

6. Among the means whereby the defendants and their co-conspirators would and did carry out unlawful purposes of said conspiracy were the following:

(a) During the summer of 1973, MARCUS GEORGE HERO, a financial consultant and GORDON M. SAKS, an accountant, would and did agree to prepare applications for direct loans from the Small Business Administration (hereinafter "S.B.A.").

(b) MARCUS GEORGE HERO would receive 12% of the face amount of each loan to be distributed as follows: 10% to public officials within the S.B.A. and 2% for his services.

(c) MARCUS GEORGE HERO would arrange for a loan officer in the S.B.A. to obtain for processing loan applications which were prepared and submitted or caused to be submitted by HERO and SAKS.

(d) In or about October 1972, MARCUS GEORGE HERO and GORDON M. SAKS, would and did cause an application for a \$50,000 direct loan from the S.B.A. for the Northstate Packing Company, Inc. (hereinafter, "Northstate"), a theretofore non-existent corporation, to be submitted to the S.B.A.

(e) The Northstate application would and did contain false and fraudulent statements concerning the prior existence of the corporation, its net worth, false and fraudulent invoices for non-existent supplies, and false statements regarding compensation to be paid for obtaining the loan.

(f) MARCUS GEORGE HERO would and did cause the Northstate loan application to be approved and would pay and cause to be paid the approximate sum of \$5000. to an official of the S.B.A. and would receive \$1500. of the loan proceeds for himself.

(g) On or about February 11, 1974, GORDON M. SAKS and MARCUS GEORGE HERO would and did cause a false application for a \$70,000 direct loan for Cheong's Garden, Inc. to be submitted to the S.B.A.

(h) On or about June 21, 1974, GORDON M. SAKS and MARCUS GEORGE HERO would and did cause a false application for a

GEW:jp

\$100,000 direct loan for Clayton-Camper Park Grounds, Inc., a theretofore non-existent corporation, to be submitted to the S.B.A.

(1) On or about June 25, 1974, GORDON M. SAKS and MARCUS GEORGE HERO would and did cause a false application for a \$100,000 direct loan for the State Appliance Company, a non-existent company, to be submitted to the S.B.A.

OVERT ACTS

In furtherance of said conspiracy and to effect its objects thereof, defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

(1) In October, 1973 GORDON M. SAKS and MARCUS GEORGE HERO prepared an S.B.A. loan application for Northstate Packing Company, Inc.

(2) On or about October 22, 1973, GORDON M. SAKS caused said S.B.A. loan application to be signed.

(3) On or about January 11, 1974, GORDON M. SAKS, posing as George Saunders, signed a S.B.A. Compensation Agreement.

(4) On or about February 5, 1974, GORDON M. SAKS, posing as George Saunders, attended the loan closing for Northstate at 26 Federal Plaza, New York, New York and received approximately \$42,000 in checks drawn to fictitious payees previously furnished as creditors of Northstate.

(5) On or about February 22, 1974, GORDON M. SAKS gave MARCUS GEORGE HERO \$6000 in the vicinity of 2nd Avenue and 43rd Street, New York, New York.

(Title 18, United States Code, Section 371)

A-16  
-5-

COUNT TWO

The Grand Jury further charges:

On or about October 22, 1973 in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit: the United States Small Business Administration, MARCUS GEORGE HERO, and GORDON M. SAKS a/k/a George Saunders, the defendants, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device material facts, and did make and cause to be made false, fictitious and fraudulent statements and representations and did make and cause to be made and use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendants, MARCUS GEORGE HERO, and GORDON M. SAKS a/k/a George Saunders submitted and caused to be submitted to the United States Small Business Administration, an application for a \$50,000 loan from the United States Small Business Administration in which it was represented that, among other things, Northstate Packing Company, Inc. had been engaged in the slaughter of hogs; had entered into a contract with Thousand Island Hog Breeders for the purchase of animals; and that as of September 30, 1973 had a net worth or total stockholders equity of \$16,250 when in truth and in fact, as the defendants then and there well knew, said statements and documents were untrue.

(Title 18, United States Code, Section 1001 and 2.)

GEW:jp

COUNT THREE

The Grand Jury further charges:

On or about January 11, 1974, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, that is, the United States Small Business Administration, MARCUS GEORGE HERO, and GORDON M. SAKS a/k/a George Saunders, the defendants, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device material facts, and did make and caused to be made false, fictitious and fraudulent statements and representations and did make and caused to be made and use and caused to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendants, MARCUS GEORGE HERO, and GORDON M. SAKS submitted and caused to be submitted to the United States Small Business Administration, a statement that no attorney, accountant, appraiser, agent or any party engaged by or on behalf of Northstate Packing Company, Inc. was to receive any fee, or other charge or compensation for the purpose of rendering professional or other services of any nature for or in connection with the preparation or presentation of its application for a \$50,000 loan from the United States Small Business Administration, when in truth and in fact, as the defendants then and there well knew said statements were untrue.

(Title 18, United States Code, Section 1001 and 2)

M. Shew  
Foreman

Paul J. Curran  
PAUL J. CURRAN  
United States Attorney

A/Y  
COPY  
F. BURCHARDT, Clerk  
By Warren Freeman  
Deputy Clerk

GEW:1q  
d-337

INDICTMENT (74 Cr. 1051)  
MODERN CENTURY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA, :

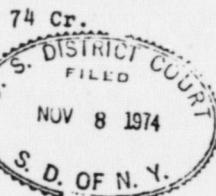
- v -

LEONARD RANDELL, GERALD DEVINS,  
MARCUS GEORGE HERO and GORDON M.  
SAKS,

Defendants. :

74 CRIM. 1051

INDICTMENT



The Grand Jury charges:

1. From on or about October 13, 1972, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, LEONARD RANDELL, GERALD DEVINS, MARCUS GEORGE HERO and GORDON M. SAKS, the defendants, and Richard R. Repass, named as a co-conspirator but not as a defendant, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together and with each other and with persons to the Grand Jury known and unknown, to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions, by obstructing and hindering the United States Small Business Administration in administering the Small Business Act, Title 15, United States Code, Sections 631 et seq., and to violate Title 18, United States Code, Sections 201, 1001, 1014 and Title 15, United States Code, Section 645(a).

2. It was a part of said conspiracy that the defendants and their co-conspirators would and did agree to defraud the United States of its lawful right to have the United States Small Business Administration guarantee a bank loan in the manner and for the purposes provided by Section 7(a) of the Small Business Act as amended, fairly and unpartially without

MICROFILM  
DEC 5 1974  
(1)

A-19

undue influence, unlawful inducement, false representation, favor or fraud, in that the authorization for said guarantee was subject to, and based upon a borrower's loan application, which was false, fictitious and fraudulent; and that the defendants and their co-conspirators misapplied the proceeds of the loan.

3. It was further a part of said conspiracy that the defendants and their co-conspirators, in matters within the jurisdiction of a department and agency of the United States, that is, the United States Small Business Administration, unlawfully, wilfully and knowingly, would and did falsify, conceal and cover up and caused to be falsified, concealed and covered up by trick, scheme and device material facts and make and cause to be made, false, fictitious and fraudulent statements and representations and would make and use and cause to be made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

4. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly would and did make false statements and reports and overvalue property and securities for the purpose of influencing the action of the Underwriters Bank and Trust Company (since renamed United America's Bank), [hereinafter "Underwriters"], a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon an application and loan, that is, a loan for \$350,000.00 to Modern Century Company, Inc. (hereinafter "Modern").

5. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly would and did make and cause to be made false statements and intentionally overvalue and cause to be overvalued a security in an application filed with the United States

Small Business Administration for the purpose of obtaining for themselves and others a guarantee by the Small Business Administration of 90% of the principal amount of a bank loan, to Modern.

6. It was further a part of said conspiracy that defendants and their co-conspirators unlawfully, wilfully and knowingly would and did directly and indirectly, corruptly give, offer, and promise and cause to be given, offered and promised, things of value to public officials, that is, officers of the United States Small Business Administration, with intent to influence official acts of said public officials; to influence said public officials to commit and aid in committing and collude in and allow a fraud and make opportunity for the commission of a fraud on the United States; and to induce said public officials to do and omit to do acts in violation of their lawful duties.

7. It was further a part of said conspiracy that defendants and their co-conspirators unlawfully, wilfully and knowingly, would, otherwise than as provided by law for the proper discharge of official duties, directly and indirectly give, offer and promise things of value to public officials, that is, officers of the United States Small Business Administration for and because of official acts performed and to be performed by said public officials.

8. Among the means whereby the defendants and their co-conspirators would and did carry out the objects of said conspiracy were the following:

(a) The defendants LEONARD RANDELL, president of the Small Business Electronics Investment Company, a Small Business Investment Company; GERALD DEVINS, an accountant; and MARCUS GEORGE HERO, a financial consultant and former employee of the Small Business Administration (hereinafter "S.B.A."), would promise to assist Modern in obtaining a \$350,000.00 bank loan, 90% of the principal of which would be guaranteed by the S.B.A., by preparing and causing to be

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

1. On or about October 20, 1972, the defendant GORDON M. SAKS and another went to Underwriters, 50 Broadway, New York, New York.
2. On or about November 6, 1972, the defendant GORDON M. SALS and another went to Underwriters, 50 Broadway, New York, New York.
3. On or about November 6, 1972, the defendant GORDON M. SAKS cashed a check at the Republic National Bank at Fifth Avenue and 40th Street, New York, New York.
4. On or about November 6, 1972, the defendants GORDON M. SAKS, MARCUS GEORGE HERO and others met at the Shun Lee Dynasty Restaurant, 2nd Avenue at 48th Street, New York, New York.
5. On or about November 9, 1972, the defendant GORDON M. SAKS met GERALD DEVINS at the Chelsea Motel, 222 West 23rd Street, New York, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about October 20, 1972, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Small Business Administration, LEONARD RANDELL, GERALD DEVINS, MARCUS GEORGE HERO and GORDON M. SAKS, the defendants, unlawfully, wilfully and knowing y did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device material facts, and did make and cause to be made false, fictitious and fraudulent statements, and representations and did make and cause to be made and use and cause to be used false writings and documents knowing the same to contain

false, fictitious and fraudulent statements and entries, in that the defendants LEONARD RANDELL, GERALD DEVINS, and MARCUS GEORGE HERO submitted and caused to be submitted to the United States Small Business Administration, an application for a \$350,000 loan by Modern Century Company Inc. (hereinafter "Modern"), to be guaranteed by the United States Small Business Administration in which it was represented that Modern possessed current assets consisting of \$500,000.00 worth of pre-paid television advertising time; that Modern possessed current assets consisting of \$90,557.00 worth of inventory; and that no attorney, accountant, appraiser, agent or any party engaged by or on behalf of Modern had received or was to receive any fee, or other charge or compensation for the purpose of rendering professional or other services of any nature for or in connection with the preparation or presentation of said loan application, when in truth and in fact as the defendants then and there well knew said statements and documents were untrue.

(Title 18, United States Code, Section 1001 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the October 20, 1972, in the Southern District of New York, the defendants, LEONARD RANDELL, GERALD DEVINS, MARCUS GEORGE HERO and GORDON M. SAKS, unlawfully, wilfully and knowingly did make and cause to be made a false statement and report for the purpose of influencing the action of Underwriters Bank and Trust Company (since renamed United Americas Bank), a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon an application and loan, for \$350,000 by Modern Century Company, Inc. (hereinafter "Modern"), in that the defendants represented and caused to be

represented to said bank that Modern possessed current assets consisting of \$500,000.00 of prepaid television advertising time; that Modern possessed current assets consisting of \$90,557. of inventory; and that no attorney, accountant, appraiser, agent or any party engaged by or on behalf of Modern had received or was to receive any fee or other charge or compensation for the purpose of rendering professional or other services of any nature whatever for or in connection with the preparation or presentation of said loan application, when, in truth and in fact, as the defendants then and there well knew, said representations were untrue.

(Title 18, United States Code, Sections 1014  
and 2)

Muri Shew  
Foreman

Paul J. Curran  
PAUL J. CURRAN  
United States Attorney

A TRUE COPY  
RAYMOND F. BURCHARDT, Clerk

By Harold Reeder  
Deputy Clerk

A-25

CHARGE

T1 pm

CHARGE

1593

1 JQjw 1

2 A F T E R N O O N     S E S S I O N

3                    2:00 P.M.

4 CHARGE OF THE COURT

5 (In open court - jury present)

6

7                    THE COURT: That announcement, members of  
8 the jury, was so that you would not be distracted by  
9 people walking in and out of the courtroom while I am  
10 instructing you as to the law.

11                  You are about to enter upon your final duty  
12 which is to decide the fact issues in this case. As I  
13 told you in my instructions at the beginning of the trial  
14 your principal function during the taking of testimony  
15 would be to listen carefully and observe each witness  
16 as he testified and it has been evident to me that you  
17 have faithfully performed this duty.

18                  The trial of this case has been somewhat  
19 protracted due to the number of witnesses who testified  
20 and the number of documents received in evidence and read  
21 by you. This was unavoidably time-consuming and at times  
22 even tedious but nonetheless your interest never flagged  
23 and it is evident that you have followed the testimony  
24 with close attention.

25                  We have now reached the point of the case

A-26

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

2 where all the evidence has been presented and the closing  
3 arguments of the lawyers have been made. Shortly after  
4 I have completed my explanation of the applicable law  
5 you will retire to deliberate upon your verdict. You  
6 are to perform your final duty in an attitude of complete  
7 fairness and impartiality. You are to appraise the  
8 evidence calmly and deliberately and as was emphasized  
9 by me at the time of your selection as jurors without  
10 prejudice with respect to either the government or the  
11 defendants as parties to this controversy.

12 The fact that this prosecution is brought  
13 in the name of the United States of America entitles  
14 the government to no greater consideration than that  
15 accorded to the defendant in a case and by the same  
16 token it is entitled to no less consideration.

17 All parties stand as equals before the bar  
18 of justice. Your final role is to pass upon and decide  
19 the fact issues in the case. You, the members of the  
20 jury, are the sole and exclusive judges of the facts.  
21 You pass upon the weight of the evidence. You determine  
22 the credibility of the witnesses. You resolve such con-  
23 flicts as there may be in testimony and you draw whatever  
24 reasonable inferences are to be drawn from the facts  
25 as you determine them to be.

A-27

2 My function at this point is to instruct you  
3 as to the law. It is your duty to accept these instructions  
4 and apply them to the facts as you determine them. The logi-  
5 cal result of that application will be your verdict in this  
6 case.

7 With respect to any fact matter, it is your  
8 recollection and yours alone that governs. Anything that  
9 counsel either for the government or for the defendant may  
10 have said with respect to any matters in evidence, question,  
11 in argument or in summation, is not to be substituted for  
12 your own independent recollection. So too anything that  
13 the Court may have said during the progress of the trial  
14 with respect to a fact matter or may say during the course  
15 of these instructions is not to be taken in substitution  
16 for your own independent recollection which governs at all  
17 times.

18 Before we consider the precise charges in the  
19 indictment, a number of preliminary observations are in  
20 order.

21 In determining the facts you should not be  
22 influenced by rulings that the Court may have made during  
23 the trial. These rulings dealt with matters of law and  
24 not questions of fact. Counsel for both sides had not  
25

A-28

2 only the right but indeed the duty to press whatever  
3 legal objections they believe existed as to the admission  
4 of offered evidence. The Court's rulings on objections  
5 made by either the attorney for the government or the  
6 attorney for the defendant are not to be considered by  
7 you.

8                   Of course, as I told you at the outset,  
9 where I have sustained an objection to a question you  
10 must not speculate on what the witness would have said  
11 had he been permitted to answer. Nor may you draw any  
12 inference from the wording of the question or that it  
13 was asked.

14                   You must never speculate to be true any  
15 insinuation suggested by a question asked of a witness.  
16 A question is not evidence and may be considered only  
17 as it supplies meaning to the answer.

18                   Similarly, where any testimony has been  
19 stricken it is not evidence and you are bound to dis-  
20 regard it. However you must remember that in ruling on  
21 objections the Court was deciding questions of law and  
22 not questions of fact which are for the jury alone.

23                   During the course of the trial you may have  
24 thought that there were occasions when I admonished either  
25 the attorney for the government or the attorney for the

A-29

2 defendant. Sometimes in the ardor of advocacy counsel  
3 say or do things which in calmer moments they would not  
4 have said or done. Any such incidents must play no part  
5 in your deliberations. The personalities of the  
6 lawyer or of the judge have nothing to do with the deter-  
7 mination of this case.

8 I recognize that any judge can have a great  
9 deal of influence with a jury. I want you to understand  
10 that I have no opinion with respect to the guilt or  
11 innocence of this defendant. If you do think that you  
12 have gleaned some indication as to my opinion of the  
13 case either from any questions I may have asked or from  
14 my expression or tone of voice, disregard it entirely.

15 The Court has no opinion as to the veracity  
16 or the credibility of the witnesses or the merits of the  
17 case. You are the judges of the facts and you are the  
18 sole judges of the guilt or innocence of the defendant.  
19 I am merely a judge of the law. The fact issues must  
20 be decided by you solely and only within the framework  
21 of the evidence and the principles of law that apply.

22 Finally, please don't single out any one  
23 instruction of mine as stating the law alone. Take them  
24 all into account after you have heard them all.

25 Now you are to consider only the evidence

7-30

2 in this case and that evidence consists of the sworn  
3 testimony of the witnesses, the facts which have been  
4 stipulated and the presumptions which I will tell you  
5 about in these instructions such as the presumption of  
6 innocence.

7 But while you are to consider only the  
8 evidence in the case you are not limited to the bold  
9 statements of the witnesses. On the contrary, you are  
10 permitted to draw from the facts which you find have  
11 been proved such reasonable inferences as seem justified  
12 to you in light of your own experience.

13 An inference is merely another word for a  
14 conclusion which reason or common sense leads you to  
15 draw from the facts that have been proved here.

16 In considering the evidence you must remember,  
17 as I told you at the very beginning of this trial, that  
18 the indictment is only a formal method of accusing a  
19 defendant of the crimes charged and it itself is not  
20 evidence against the defendant. No weight is to be given  
21 to the fact that an indictment has been returned against  
22 the defendant.

23 Generally speaking there are two types of  
24 evidence from which a jury may properly find the truth  
25 as to the facts of the case. One is direct evidence, such

A.3/

1 qjw 7

2 as the testimony of an eyewitness, somebody who saw or  
3 heard something done or said.

4 The other is indirect or circumstantial  
5 evidence. That is the proof of a chain of circumstances  
6 pointing to the existence or non-existence of certain  
7 facts.

8 Generally the law makes no distinction between  
9 direct and circumstantial evidence but simply requires  
10 that the jury find the facts in accordance with all the  
11 evidence in the case both direct and circumstantial.

12 We have a fairly common example that is  
13 used by other judges and myself to illustrate what is  
14 meant by circumstantial evidence. Assume when you came  
15 to court this morning, as is the case, that the sun was  
16 shining brightly, the sky was clear, no rain clouds on  
17 the horizon, and in addition assume that we were in one  
18 of the modern courtrooms right in the front entrance that  
19 had no windows in it. Assume further that you had been  
20 in court for about an hour or so and someone walked in and  
21 his clothes were dripping wet. Assume that a few minutes  
22 later someone else came in and he had an umbrella in his  
23 hand and that also was dripping water and assume that a  
24 few minutes later another spectator came into the court-  
25 room and he has a hat in his hand and a raincoat and they

7-32

2 are all dripping wet. Even though you could not directly  
3 look out and observe the weather and even though it  
4 was not raining when you entered the courthouse you could  
5 reasonably and logically conclude from the combination  
6 of facts that I have described that in fact it was raining  
7 outside.

8 That is circumstantial evidence, a chain of  
9 circumstances which leads you to conclude that a fact  
10 exists or does not exist.

11 As I indicated to you before, generally the  
12 law makes no distinction between direct or circumstantial  
13 evidence, it only requires that you find the facts in  
14 accordance with all the evidence in the case.

15 I have indicated to you before that no  
16 inference is to be drawn from the fact that the defendant  
17 here was indicted. An indictment is merely an accusation  
18 and is not evidence of anything. It is merely the method  
19 by which a defendant is apprised of the charges against  
20 him and brought to trial.

21 The defendant has entered a plea of not  
22 guilty to the charges in the indictment and thus the  
23 burden is on the prosecution to prove guilt beyond a  
24 reasonable doubt. This burden never shifts to a defendant  
25 for the law never imposes upon a defendant in a criminal

4-33

2 case the burden or duty of calling any witnesses or  
3 producing any evidence.

4                 The law presumes a defendant to be innocent  
5 of crime. Thus a defendant although accused begins the  
6 trial with no evidence against him and the law permits  
7 nothing but legal evidence presented before you as jurors  
8 to be considered in support of any charge against a  
9 defendant.

10                 The presumption of innocence remains with  
11 the defendant throughout the trial and your deliberations  
12 until such time, if ever, that the jury is satisfied  
13 of guilt beyond a reasonable doubt. Thus the presumption  
14 of innocence alone is sufficient to acquit a defendant  
15 unless and until after careful and impartial consideration  
16 of all the evidence in the case you as jurors are unani-  
17 mously convinced of a defendant's guilt beyond a reason-  
18 able doubt. That term reasonable doubt I will define  
19 for you later on in these instructions.

20                 Having concluded my preliminary instructions  
21 I now turn to the specific charges alleged in the indict-  
22 ments. The three indictments in this case contain a  
23 total of eight counts and name four defendants. One of  
24 them names four defendants and the other names two defend-  
25 ants. Each of these counts charges a separate crime and

17.34

2 each count must be considered separately by you.

3           Only the Defendant Hero is on trial before  
4 you. He is the only person whose guilt or innocence you  
5 must announce in your verdict. The fact that there are  
6 other defendants not on trial before you and that other  
7 persons although named as co-conspirators were not in-  
8 dicted as defendants is not to enter into your delibera-  
9 tions except insofar as it may bear on their credibility  
10 as witnesses and as I will explain to you shortly, inso-  
11 far as that in considering the guilt or innocence of  
12 the defendant on trial you may have to determine the  
13 nature of the participation, if any, of others.

14           In your determination of innocence or guilt  
15 remember that a separate crime or offense is charged  
16 against the defendant in each count of the indictment  
17 and that each offense and the evidence pertaining to it  
18 should be considered separately. The fact that you may  
19 find the defendant guilty or not guilty of one of the  
20 offenses charged should not control your verdict as to  
21 any other offenses charged against him.

22           Let me state something that is probably  
23 obvious to you, but the mere fact that I put these phrases  
24 and say, as I have said in here, the fact you may find  
25 the defendant guilty or not guilty, the fact that I put

A-35

1 qjw 11

1603

2 the word guilty before not guilty is to have no bearing  
3 on it at all. Words have to be put in a certain way  
4 and throughout the charge don't take it in any way except  
5 that I am explaining it to you. I am sure you would not  
6 but perhaps it is wisest to remind you of that.

7 You should consider only the charges submitted  
8 to you. Certain counts have been removed from your con-  
9 sideration. You should draw no inference as to the guilt  
10 or innocence of this defendant on the charges submitted  
11 to you from the fact that these counts have been eliminated.  
12 In removing these charges from you I was passing solely  
13 upon a matter of law which should have no bearing on your  
14 deliberations nor should you consider it in any way.

15 The government and defense counsel have in  
16 their extended summations fully reviewed the evidence and  
17 urged upon you their various contentions. Usually I  
18 marshal the evidence but the summations here have been  
19 so thorough that if I were to follow that practice it  
20 would be at the risk of worrisome repetition and counsel  
21 have agreed that there is no need for me to do so in  
22 this case.

23 They have pretty much covered the witnesses  
24 who appeared before you but perhaps it would be appropriate  
25 for me to chronologically list the witnesses who did

A 36

1 qjw 12

1604

2 appear before you. Before I do that I would like to  
3 remind you again that with respect to any fact matter it  
4 is your recollection and yours alone that governs. While  
5 I have gone carefully through my notes and the transcript  
6 of the testimony in preparing the summary of witnesses  
7 which I am about to read to you nothing I say is to be  
8 taken in substitution for your own independent recollection  
9 which governs at all times. Moreover, all evidence  
10 whether or not I have referred to it our counsel have  
11 alluded to it in their summations is important and must  
12 be considered by you.

13 The first witness called was John Gaeta. He  
14 was the chief of the finance division of the Small Busi-  
15 ness Administration and he described the procedures in  
16 that office and identified certain exhibits.

17 The second witness was Thomas E. Darrow who  
18 in 1972 was senior vice-president of the Underwriters  
19 Bank and Trust Company and he testified with respect to  
20 the Smoke Watchers loan application and his relationship  
21 with Mr. Catale.

22 The next witness was John M. Gallagher who  
23 with the Underwriters Trust Company worked under Mr.  
24 Darrow and he testified and identified certain exhibits  
25 with respect to the Modern Century and Mini Enterprises

A37

1 qjw 13

1605

2 loans.

3                   The next witness was Salvatore Catalanotto,  
4 also known as Sal Catale. He was an accountant. He was  
5 examined and cross examined with respect to his knowledge  
6 of the facts that had been presented here before you and  
7 he was further named as an unindicted co-conspirator in  
8 one of these indictments and I will get to that later on.  
9 That is the Mini Enterprises 74 Crim. 1055. I will  
10 instruct you further about that later on in my charge.

11                  We next had the direct testimony of Nicholas  
12 Costa who was a real estate broker and who in 1971 was  
13 the president of Smoke Watchers. He also was an unindicted  
14 co-conspirator in one of these indictments.

15                  Following that, his direct testimony, there  
16 was a stipulation which was entered into between counsel  
17 that Underwriters Bank and Trust Company was a member of  
18 the Federal Deposit Insurance Company.

19                  The next witness was Carolyn Ugiss who in 1972  
20 was the public relations director of Smoke Watchers and  
21 she was examined and cross examined both with respect to  
22 her participation in the loan applications and so forth  
23 with respect to her relationship, non-business relation-  
24 ship with Mr. Costa, and with respect to her being either  
25 a co-conspirator or an accomplice. I will later instruct

A 38

1 qjw 14

1606

2 you with respect to how you assess that.

3           The next witness was Leon Glackman, vice-  
4 president of the Bankers Trust. He was followed by Mr.  
5 Joseph Colgan who worked under Mr. Glackman at the Bankers  
6 Trust.

7           The next witness was Richard RePass who was  
8 in the publishing business with Gordon Saks and who was  
9 also an unindicted co-conspirator. Following his testi-  
10 mony we had Catale back on the stand for further cross  
11 examination with respect to certain telephone calls.

12           Mr. Costa was then on the stand for cross  
13 examination followed by Gordon Saks and in addition to  
14 the testimony he gave with respect to the factual issues  
15 where he was involved, he further stated that he had  
16 pled guilty to parts of another indictment and to parts  
17 of this indictment.

18           With respect to his relationship with Sylvia  
19 Bailey and use of aliases and so forth about which I will  
20 further instruct you when I come to the question of  
21 credibility.

22           The next witness was Leonard Edelman who was  
23 administrative officer of the Small Business Administration.  
24 Mr. RePass was then recalled for further cross examination.

25           Mr. Catale was back on the stand for further

1 qjw 15

1607

2 cross examination and Sylvia Bailey then was on the stand.  
3 I am not going to review her testimony. But following  
4 her cross examination she had refused to answer a question  
5 and after that there was a stipulation of facts entered  
6 into between the attorneys with respect to the fact that  
7 if she had answered the question as to her occupation  
8 the answer would have been prostitute.

9 Joseph Colgan was recalled to the stand with  
10 respect to where he was between March 25th and March 31st.  
11 The next witness was C.E. Feltner, Jr. who testified  
12 with respect to his television contract with Mr. Devins.

13 The final government witness was Francis  
14 Tober, the FBI special agent, after which the government  
15 rested its case.

16 The defendant then called Michael Donohue,  
17 an assistant vice-president of Bankers Trust Company.  
18 The defendant then took the stand and his testimony was  
19 interrupted by the production of three character witnesses,  
20 Mr. Kostavellos, the retail florist, Mr. Danos H. Kallos,  
21 retirement government employee, and Father Angelo Devalis  
22 who was the pastor of the Three Hierarchs Church and after  
23 that they had testified Mr. Costa resumed the stand and  
24 was further examined and cross examined.

ndlpm

25

440

1 arbr 1

1608

t2/1 pm 2 Now, the defendant Hero here is charged in three  
3 separate indictments with various crimes. You must attach  
4 no significance whatsoever to the fact that the charges  
5 are contained in separate indictments. Each indictment  
6 has a number and for the purpose of convenience, I shall  
7 refer to them by the name of the company which is contained  
8 in the indictment. That is 74 Crim. 1051 is the Modern  
9 Century indictment; 74 Crim. 1053 is the North State Packing  
10 Company indictment; and 74 Crim. 1055 is the Mini Enterprises  
11 indictment.

12 Now perhaps for your information I will tell you  
13 now that at the time you retire you will have before you  
14 all of those indictments presently pending. Those indictments  
15 will be available for you.

16 You may wonder when I said 74 Crim. or maybe you  
17 don't but this is our way of designating it is a criminal  
18 case and a civil case we refer to as 74 Civ. instead of  
19 Crim. That is an abbreviation of that.

20 Now, the indictments charge two conspiracies and  
21 six substantive counts. Substantive counts and conspiracy  
22 counts are governed by different legal principles. Since  
23 the essential elements which the government must prove before  
24 a conviction may be had is different on each count we will  
25 consider them separately. I will begin with the conspiracy

A41

1 arbr 2

1609

2 counts.

3 Both conspiracy counts charge the defendant with  
4 violating Title 18 United States Code, Section 371, and  
5 you don't have to remember the section of the code, merely  
6 what it states and it provides in pertinent part as follows:

7 "If two or more persons conspire either to commit  
8 any offense against the United States or to defraud the  
9 United States, or any agency thereof in any manner or for  
10 any purpose, and one or more of such persons do and  
11 actually effect the object of the conspiracy each commits  
12 a crime."

13 Both conspiracy counts are divided into two  
14 sections. I will read the section of each one which  
15 refers to the overt acts separately. I will read the first  
16 section of each conspiracy count to you now. Just let me  
17 inform you that the repetition of this, as I told you before,  
18 it is nothing more than a charge but you have heard when  
19 I selected you as jurors what the charges were that are  
20 involved. You heard it I guess when both counsel in their  
21 opening statements referred to what was involved here or  
22 what was charged, or Mr. Wilson I guess at greater length  
23 than Mr. Gotkin in the opening statement as to what that  
24 was.

25 Then you heard it again in summation of counsel and

442

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 arbr 3

1610

2 you are hearing it for the fourth or fifth time. Don't  
3 attach any significance to it, as I told you before, but  
4 you have been informed of what the charges are here.

5 The Modern Century, which is 74 Crim. 1051 reads as  
6 follows in pertinent part. I will not read all of it to  
7 you because there are some matters of the conspiracy charge  
8 that refer to the means and so forth that are not essential  
9 for me to charge you with respect to informing you of  
10 the nature of the crime charged here.

11 "The grand jury charges:

12 "1. From on or about October 13, 1972, up to  
13 and including the date of the filing of this indictment,  
14 in the Southern District of New York and elsewhere,  
15 Leonard Randell, Gerald Devins, Marcus George Hero and  
16 Gordon M. Saks, the defendants, and Richard R. RePass, named  
17 as a co-conspirator but not as a defendant, unlawfully,  
18 wilfully and knowingly did combine, conspire and confederate  
19 and agree together and with each other and with persons  
20 to the grand jury known and unknown, to defraud the United  
21 States and its departments and agencies in connection with  
22 the performance of their lawful governmental functions,  
23 by obstructing and hindering the United States Small  
24 Business Administration in administering the Small Business  
25 Act, Title 15, United States Code, Sections 631 et seq.,

A43

1 arbr 4

2 and to violate Title 18, United States Code, Sections 201,  
3 1001, 1041 and Title 15, United States Code, Section 645(a).

4 "2. It was a part of said conspiracy that  
5 the defendants and their co-conspirators would  
6 and did agree to defraud the United States of its lawful  
7 right to have United States Small Business Administration  
8 guarantee a bank loan in the manner and for the purposes  
9 provided by Section 7(a) of the Small Business Act as  
10 amended, fairly and unpartially without undue influence,  
11 unlawful inducement, false representation, favor or fraud,  
12 in that the authorization for said guarantee was subject  
13 to, and based upon a borrower's loan application, which  
14 was false, fictitious and fraudulent; and that the defendants  
15 and their co-conspirators misapplied the proceeds of the  
16 loan.

17 "3. It was further a part of said conspiracy  
18 that the defendants and their co-conspirators, in matters  
19 within the jurisdiction of a department and agency of the  
20 United States, that is, the United States Small Business  
21 Administration, unlawfully, wilfully and knowingly, would and  
22 did falsify, conceal and cover up and caused to be falsified,  
23 concealed and covered up by trick, scheme and device material  
24 facts and make and cause to be made, false, fictitious  
25 and fraudulent statements and representations and would make

A44

1 arbr 5

2 and use and cause to be made and used false writings and  
3 documents knowing the same to contain false, fictitious  
4 and fraudulent statements and entries.

5 "4. It was further a part of said conspiracy  
6 that the defendants and their co-conspirators unlawfully,  
7 wilfully and knowingly would and did make false statements  
8 and reports and overvalue property and securities for the  
9 purpose of influencing the action of the Underwriters Bank  
10 & Trust Company (since renamed United America's Bank,  
11 hereinafter Underwriters), a bank the deposits of which  
12 were then insured by the Federal Deposit Insurance  
13 Corporation, upon an application and loan, that is, a loan  
14 for \$350,000 to Modern Century Company, Inc. (hereinafter  
15 Modern.)

16 "5. It was further a part of said conspiracy  
17 that the defendants and their co-conspirators unlawfully,  
18 wilfully and knowingly would and did make and cause to be  
19 made false statements and intentionally overvalue and caused  
20 to be overvalued a security in an application filed with the  
21 United States Small Business Administration for the purpose  
22 of obtaining for themselves and others a guarantee by the  
23 Small Business Administration of 90 per cent of the principal  
24 amount of a bank loan to Modern.

25 "6. It was further a part of said conspiracy

145

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
that defendants and their co-conspirators unlawfully,  
wilfully and knowingly would and did directly and indirectly,  
corruptly give, offer, and promise and cause to be given,  
offered and promised, things of value to public officials,  
that is, officers of the United States Small Business  
Administration, with intent to influence official acts  
of said public officials; to influence said public officials  
to commit and aid in committing and collude in and allow  
a fraud and make opportunity for the commission of a fraud  
on the United States; and to induce said public officials  
to do and omit to do acts in violation of their lawful  
duties.

"7. It was further a part of said conspiracy  
that defendants and their co-conspirators unlawfully,  
wilfully and knowingly, would, other than as provided by  
law for the proper discharge of official duties, directly  
and indirectly give, offer and promise things of value to  
public officials, that is, officers of the United States  
Small Business Administration for and because of official  
acts performed and to be performed by said public officials."

That is the body of the conspiracy charge on  
Modern Century and, as I said before, I will give you the  
overt acts later.

I will now read to you the conspiracy charge in

1 arbr 7

1614

2 74 Crim. 1053, which is the North State Packing Company  
3 matter.

4 "The Grand Jury charges:

5 "1. From in and around August 1973 up  
6 to and including the date of the filing of this indictment  
7 in the Southern District of New York and elsewhere, Marcus  
8 George Hero and Gordon M. Saks, also known as George  
9 Saunders (hereinafter referred to as Saks), the defendants,  
10 unlawfully, wilfully and knowingly did combine, conspire  
11 and confederate and agree together and with each other and  
12 with others to the Grand Jury known and unknown to defraud the  
13 United States and its departments and agencies, to wit,  
14 the United States Small Business Administration in connection  
15 with the performance of its lawful governmental function  
16 by obstructing and hindering the administration of the Small  
17 Business Act, Title 15, United States Code, Section 631 et seq.,  
18 in carrying out the declared policy of Congress that the  
19 government should aid, counsel, assist and protect, insofar  
20 as it is possible the interests of Small Business  
21 concerns in order to insure free competitive enterprise  
22 and to maintain and strengthen the overall economy of the  
23 nation; and to violate Title 18, United States Code, Sections  
24 201, 1001 and Title 15, United States Code, Section 645(a).  
25

"2. It was a part of said conspiracy that

A47

2 defendants and their co-conspirators would unlawfully,  
3 wilfully and knowingly, directly and indirectly, corruptly  
4 give, offer and promise and cause to be given, offered and  
5 promised, things of value to public officials, to wit,  
6 officers of the SBA, with intent to influence official  
7 acts of said public officials, to influence said public  
8 officials to commit and aid in committing and collude  
9 in and allow a fraud and make opportunity for the commission  
10 of a fraud on the United States, and to induce said  
11 public officials to do and omit to do acts in violation  
12 of their lawful duties.

13 "3. It was further a part of said conspiracy  
14 that defendants and their co-conspirators would unlawfully,  
15 wilfully and knowingly, otherwise than as provided by law  
16 for the proper discharge of official duties, directly and  
17 indirectly give, offer and promise things of value to  
18 public officials, to wit, officers of the SBA for and  
19 because of official acts performed and to be performed  
20 by said public officials.

21 "4. It was further a part of said conspiracy  
22 the defendants and their co-conspirators in matters within  
23 the jurisdiction of a department and Agency of the United  
24 States, that is, the United States Small Business Admin-  
25 istration, unlawfully, wilfully and knowingly would and did

A48

1 arbr 9

2 falsify, conceal and cover-up and cause to be falsified,  
3 concealed and covered up by trick, scheme and device  
4 material facts and make and cause to be made false,  
5 fictitious and fraudulent statements and representations  
6 and would make and use and cause to be made and used false  
7 writings and documents knowing the same to contain false,  
8 fictitious and fraudulent statements and entries.

9                 "5. It was further a part of said conspiracy  
10 that the defendants and their co-conspirators unlawfully,  
11 wilfully and knowingly would and did make and cause to be  
12 made false statements and intentionally overvalue and cause  
13 to be overvalued securities in an application filed with  
14 United States Small Business Administration for the purpose  
15 of obtaining for themselves and others loans from the Small  
16 Business Administration."

17                 Now, those are the first part of each of the  
18 conspiracy counts. I want to remind you before  
19 I instruct you on the law of conspiracy, that each of the  
20 two separate conspiracies alleged is a separate offense and  
21 it is to be considered by you independently. Although the  
22 instructions I am about to give you are to be similarly  
23 applied to each conspiracy count, the evidence pertaining  
24 to each count should be considered separately.

25                 The fact that you may find the defendant guilty or

1949

2 not guilty of one of the offenses charged should not affect  
3 your verdict as to any other offense charged against him.

4                 Three essential elements are required to be proved  
5         in order to establish the offense of conspiracy. Before  
6         you may find the defendant guilty of conspiracy you must  
7         be satisfied that the government has established each of  
8         these elements by proof beyond a reasonable doubt.

9         The essential elements are:

10               First, that at or about the time alleged in the  
11         indictment an agreement existed between two or more of the  
12         alleged conspirators to commit at least one of the crimes  
13         described in the conspiracy count.

14               Second, that the defendant knowingly and wilfully  
15         became a member of the conspiracy.

16               Third, that one of the conspirators knowingly  
17         committed at least one of the overt acts set forth in the  
18         indictment at or about the time alleged in the Southern  
19         District of New York.

20               The Southern District of New York runs from the  
21         tip of Manhattan to just south of Albany. For our  
22         purposes it consists here of Manhattan, New York and Bronx  
23         Counties and we don't have to consider other parts of it.

24               Now, with respect to each of these elements,  
25         some further explanation is required. First as to the

AJD

1 arbr 11

1618

2 existence of a conspiracy.

3           Simply defined a conspiracy is a combination  
4 of two or more persons by concerted action to accomplish  
5 some unlawful purpose or to accomplish some lawful purpose  
6 by unlawful means. A conspiracy is an unlawful combination  
7 or agreement to violate the law. Whether or not the  
8 persons charged in the indictment accomplished what is  
9 alleged they conspired to do is immaterial to the question  
10 of guilt or innocence.

11           Thus, the success or lack of success of the  
12 conspiracy doesn't matter, for a conspiracy is a crime  
13 entirely separate and distinct from the substantive  
14 crime that may be the goal of the conspiracy.

15           A conspiracy has sometimes been called a partnership  
16 in criminal purposes in which each member becomes the  
17 agent of every other member. However, to establish  
18 the existence of a conspiracy, the government is not re-  
19 quired to show that two or more persons sat around a table  
20 and entered into a solemn compact orally or in writing,  
21 stating that they have formed a conspiracy to violate the  
22 law, setting forth the details of it and the means by which  
23 it is to be carried out or the part to be played by each  
24 conspirator.

25           Your common sense will tell you when men undertake

AJ

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 arbr 12

1619

2 to enter into a conspiracy much is left to unexpressed  
3 understanding. Conspirators do not usually reduce their  
4 agreements to writing or acknowledge them before a notary  
5 public nor do they publicly broadcast their plans.  
6 A conspiracy is almost always characterized by secrecy.

7 In determining the existence or non-existence of  
8 a conspiracy, it is not required that you find that each  
9 and every one of the alleged conspirators joined in the  
10 conspiracy. It is sufficient if you find beyond a reason-  
11 able doubt that two or more persons in any manner through any  
12 contrivance impliedly or tacitly came to a common under-  
13 standing to violate the law.

3 14 In determining whether there has been an unlawful  
15 agreement, you may consider acts and conduct which are done  
16 to carry out a criminal purpose. Usually the only evidence  
17 available is that of disconnected acts on the part of  
18 alleged individual conspirators which acts you may find  
19 when taken together in connection with each other and with  
20 the reasonable inferences flowing therefrom show a conspiracy  
21 or agreement to secure a particular result as satisfactorily  
22 and conclusively as direct proof.

23 If upon consideration of all the evidence, both  
24 direct and circumstantial, you find beyond a reasonable  
25 doubt that the minds of at least two alleged conspirators

152

1 arbr 13

2 met in an understanding way and they agreed as I explained  
3 a conspiratorial agreement to you, to work together in  
4 furtherance of an unlawful scheme allegedly in the indict-  
5 ment and that thereafter at least one of the co-conspirators  
6 did any overt act to effect the objects of the conspiracy,  
7 then proof of the existence of the conspiracy is established.

8 In this connection as I have indicated to you  
9 before, it is not necessary for the government to prove  
10 the success of the conspiracy in order to establish the  
11 violation of the conspiracy statute.

12 As a conspiracy is basically the agreement to  
13 violate the law, it may exist even though the final  
14 objective were never accomplished.

15 Now, in connection with this first element, that  
16 is the existence of the alleged conspiracy, you will recall  
17 that I defined a conspiracy as acts by two or more persons  
18 by concerted action to accomplish some unlawful purpose  
19 or to accomplish some lawful purpose by unlawful means.  
20 Thus, before you may find that a conspiracy existed, you  
21 must also find that what the conspirators intended to do  
22 would have violated one or more federal laws if they had  
23 succeeded in accomplishing what they set out to do.

24 The indictments charge that the conspiracies had  
25 as their objects or purposes the violation of the following

1 arbr 14

1621

2 statutes: 74 Crim. 1051 and 74 Cr. 1053, the Modern  
3 and North State indictment, Title 18, United States  
4 Code, Section 201 which makes it a crime to give, offer  
5 or promise a bribe or gratuity to a public official,  
6 in this case officers of the SBA.

7 Title 18, United States Code, Section 1001, which  
8 makes it a crime to falsely conceal and cover up by  
9 trick, scheme or device material facts or to make false,  
10 fictitious or fraudulent statements or representations and  
11 to make and use false writings and documents in a matter  
12 within the jurisdiction of a department or agency of  
13 the United States, again in this case United States Small  
14 Business Administration;

15 And Title 15, United States Code, Section 645(a)  
16 which makes it a crime to make false statements or to  
17 intentionally overvalue securities in an application filed  
18 with United States Small Business Administration for the  
19 purpose of obtaining a loan.

20 In addition, the conspiracy contained in  
21 indictment 74 Crim. 1051, Modern Century contains the  
22 object or purpose of violating Title 18, United States  
23 Code, Section 1014 which makes it a crime to make false  
24 statements or reports or to overvalue property or  
25 securities for the purpose of influencing a bank the

A54

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

2 deposits of which are insured by the Federal Deposit  
3 Insurance Corporation and in an application for a loan.

4 I will later describe more fully some of the  
5 charges of the indictment that are part and parcel of the  
6 illegal purposes of the conspiracy.

7 Now, the purposes of the conspiracy, what the  
8 government must prove, it is not necessary in order to  
9 prove the conspiracies alleged that all of the unlawful  
10 objects of each conspiracy were agreed upon. It is  
11 sufficient if the government establishes beyond a reason-  
12 able doubt that one such alleged purpose in each conspiracy  
13 was understood.

14 An unlawful conspiracy may exist even though its  
15 purposes are not accomplished and evidence that its purposes  
16 were accomplished may be considered by you if you find  
17 there is sufficient evidence as to prove existence of the  
18 conspiracy.

19 Now, as to the time of the conspiracy. While  
20 the indictment charged the conspiracy began on or about  
21 and continued to on or about the following date, which is  
22 the filing of the indictment, in Modern Century from  
23 October 13, 1971 to November 8, 1974 and in 1053, the  
24 North State Packing, from August 7, 1973 to November 8,  
25 1974, it is not essential that the government prove that

A55

1 arbr 16

2 the conspiracy started and ended on or about those specific  
3 dates. It is sufficient if you find beyond a reasonable  
4 doubt that the conspiracy was formed and existed for some  
5 substantial time within that period set forth in the indict-  
6 ment and at least one of the overt acts was committed in  
7 furtherance thereof in that period.

8 A conspiracy once formed continues for as long as  
9 the evidence shows the conspirators intended to continue it.  
10 Such intention may be inferred from such activity, if  
11 any of the conspirators which you find to be in furtherance  
12 of the purpose of the conspiracy.

13 The second element, which is participation in  
14 the conspiracy, if you find beyond a reasonable doubt  
15 that a conspiracy as charged in the indictments existed,  
16 you must determine who its members were. In determining  
17 whether a defendant became a member of the conspiracy you  
18 must determine not only whether he participated in it but  
19 whether he did so with knowledge of its unlawful purpose,  
20 did he join with an awareness of at least some of the aims  
21 and purposes of the conspiracy?

22 Now, knowledge is a matter of inference from  
23 facts proved. It is not necessary that a defendant  
24 be fully informed as to the details or the scope of the  
25 conspiracy in order to justify an inference of knowledge.

A 56

1 arbr 17

2           A defendant need not know the full extent of the  
3 conspiracy and all of its activities and actors. However,  
4 mere association with one or more of the conspirators does  
5 not make one a member of the conspiracy. Nor is knowledge  
6 without participation sufficient.

7           What is necessary is that the defendant participate  
8 with knowledge of at least some of the purposes of the  
9 conspiracy, and with the intent to aid in the accomplishment  
10 of those unlawful ends.

11           Now, in determining whether a conspiracy  
12 existed, you should consider the acts and declarations of  
13 all the alleged participants. However, in determining  
14 whether a particular defendant is a member of a conspiracy,  
15 you may consider only his own acts and statements. He cannot  
16 be bound by the acts or declarations of other alleged  
17 participants unless and until you are satisfied beyond a  
18 reasonable doubt that a conspiracy existed, and that the  
19 defendant you are considering was one of its members.

20           In other words, your determination as to the  
21 participation in a conspiracy of the defendant must be  
22 based upon what you find to have been his own acts, his  
23 own conduct, his own statements or declarations, his con-  
24 nection with the acts and conduct of other alleged co-  
25 conspirators, and the reasonable inferences to be drawn

AS7

1 arbr 18

1625

2 therefrom.

3 Now, you will recall that during the course  
4 of the trial some evidence was received subject to con-  
5 nection. Objections were made and I said this testimony  
6 is taken subject to connection. Thus, testimony concerning  
7 acts or statements of one alleged co-conspirator done or  
8 said in the absence of other alleged co-conspirators,  
9 although received in evidence without limitation against  
10 the co-conspirator who did the act or made the statement  
11 or admission, was admitted into evidence as to the absent  
12 alleged co-conspirator on a conditional or tentative  
13 basis.

14 Would you like me to repeat that? I think  
15 I will.

16 During the course of the trial evidence was  
17 received, some evidence received subject to connection.  
18 Thus, testimony concerning acts or statements of one  
19 alleged co-conspirator done or said in the absence of  
20 the other alleged co-conspirators, although received in  
21 evidence without limitation against the alleged co-conspir-  
22 ator who did the act or made the statement or admission, was  
23 admitted into evidence as to the absent alleged co-conspirators  
24 on a conditional or tentative basis.

25 If you find beyond a reasonable doubt that a

AS8

2 conspiracy existed, and if you also find that the particular  
3 one was one of its members, then the statements thereof  
4 knowingly made and the acts thereof knowingly done by  
5 any person likewise found to be a member of the conspiracy,  
6 can be considered by the jury as evidence in the case  
7 as to any person found to be a member of the conspiracy,  
8 even though the statements and actions may have occurred in  
9 the absence and without the knowledge of that person,  
10 provided such statements and actions were knowingly made  
11 and done during the continuance of such conspiracy and  
12 in furtherance of some object or purpose of the conspiracy.

13 Thus statements of any conspirator which are not  
14 in furtherance of the conspiracy or which are made before  
15 its existence or after its termination, may be considered  
16 as evidence only against the person making them.

17 If you find that a conspiracy existed and a  
18 particular person knowingly participated in it, the  
19 extent of his participation has no bearing on the question  
20 of guilt or innocence. The guilt or innocence of a  
21 conspirator is not measured by the extent or duration of  
22 his participation even if he participated in some degree  
23 more limited than that of a co-conspirator, he is equally  
24 culpable so long as he was in fact a conspirator.

25 If one joined the conspiracy after its formation

A59

1 and engaged in it to a more limited degree than others,  
2 he is equally culpable so long as you find beyond a reasonable  
3 doubt that he was in fact a co-conspirator. Thus, each  
4 member of a conspiracy may perform separate and distinct  
5 acts at different times and different places.

6 Some conspirators may play major roles while others  
7 may play minor roles. It is not required that a person  
8 be a member of the conspiracy from its very start and may  
9 join it at any point during its progress and be held  
10 responsible for all that has been done before he joined,  
11 all that may be done thereafter during its pendency and  
12 while he remains a member.

eot 2 pm

13

14

15

16

17

18

19

20

21

22

23

24

25



T3pm

1 JQjw 1

1623

Charge

2 Simply stated and using the partnership  
3 analogy again, by becoming a partner he assumes all the  
4 liabilities of the partnership including those that  
5 occurred before he became a member. Similarly each con-  
6 spirator need not know the identity or the number of all  
7 his confederates. The conspirators may not have previously  
8 associated together. One of the defendants may know only  
9 one other member of the conspiracy but if he enters into  
10 an unlawful agreement with that other member of the  
11 conspiracy he becomes a party thereto.

12 Nor is it necessary that a defendant  
13 receive any pecuniary benefit from his participation  
14 in the conspiracy as long as he in fact participated  
15 in the way I have instructed you.

16 The question is, did the defendant join the  
17 others with the awareness of at least some of the basic  
18 purposes and aims of the conspiracy? If so, then he  
19 adopts as his own the past and future acts of all the  
20 other conspirators.

21 A final word on this second element, duration  
22 of participation. I told you that a conspiracy once  
23 formed is presumed to have continued until either its  
24 object was accomplished or there is some affirmative act  
25 of termination by its members. So too, once a person

A61

2 is found to be a member of the conspiracy he is presumed  
3 to continue his membership therein until its termination,  
4 and the burden is upon the conspirator to satisfy you  
5 by affirmative proof that he withdrew and disassociated  
6 himself from it.

7 You will recall I am sure that I told you  
8 that the conspiracy count of the indictment was divided  
9 into two sections. One I have already explained to you  
10 and the second section refers to the so-called overt  
11 acts.

12 If you find beyond a reasonable doubt that  
13 an alleged conspiracy existed and that the defendant was  
14 a member of the conspiracy you must then consider the  
15 third element and that is the requirement of an overt  
16 act. The overt acts referred to are not separate charges.  
17 They are part of each conspiracy count and you may not  
18 find the defendant guilty unless and until you are con-  
19 vinced beyond a reasonable doubt that at least one of  
20 the overt acts charged in the indictment was wilfully and  
21 knowingly committed by at least one of the conspirators.

22 The offense of conspiracy is complete when  
23 the unlawful agreement is made and any overt act is done  
24 by a conspirator to, in the language of the statute,  
25 effect the object of the conspiracy. Thus an overt act

A62

1 qjw 3

1630

2 is an act knowingly and wilfully committed by one of the  
3 conspirators in an effort to effect or accomplish some  
4 object or purpose of the conspiracy.

5           The overt act need not be a criminal act or  
6 an act which of itself constitutes an objective of the  
7 conspiracy. It may be an act which is innocent on its  
8 face but it must be of such character that it furthers  
9 or promotes or aids and assists in accomplishing the  
10 purpose of the conspiracy charged in the indictment.

11           It is not necessary for you to find that all  
12 of the alleged overt acts charged were committed nor is  
13 it necessary that an overt act involve a particular person.  
14 It is enough if you find that at least one of the named  
15 overt acts charged in the indictment was committed by  
16 a conspirator in furtherance of the conspiracy.

17           As I told you before, the government must show  
18 that at least one overt act in each of the conspiracies  
19 alleged was committed in the Southern District of New  
20 York which I have previously defined for you for our  
21 purposes.

22           I am going to read to you now the specific  
23 overt acts charged in each indictment. On the Modern  
24 Century, 74 Crim. 1051, the following overt acts are  
25 alleged in the indictment:

2                 "In furtherance of the said conspiracy and  
3                 to effect the objects thereof, the defendant and their  
4                 co-conspirators committed the following overt acts among  
5                 others in the Southern District of New York and elsewhere:

6                 "One:           On or about October 20, 1972,  
7                 the defendant, Gordon M. Saks and another went to Under-  
8                 writers, 50 Broadway, New York, New York.

9                 "Two:           On or about November 6, 1972  
10                the defendant Gordon M. Saks and another went to Under-  
11                writers, 50 Broadway, New York, New York.

12                "Three:          On or about November 6, 1972,  
13                Gordon M. Saks cashed a check at the Republic National  
14                Bank at Fifth Avenue and 40th Street, New York, New York.

15                "Four:           On or about November 6, 1972,  
16                the defendants Gordon M. Saks, Marcus George Hero and  
17                others met at the Shun Lee Dynasty Restaurant, Second  
18                Avenue at 48th Street, New York, New York.

19                "Five:           On or about November 9, 1972, the  
20                defendant Gord M. Saks met Gerald Devins at the Chelsea  
21                Hotel, 222 West 23rd Street, New York, New York."

22                In the North state conspiracy, 74 Crim. 1053, let  
23                me tell you that in just a moment or two we are going to  
24                take a short recess.

25                The overt acts alleged in the 74 Crim. 1053,

6/64

1 qjw 5

1632

2 in furtherance of said conspiracy and to effect its  
3 objects thereof, the defendants and their co-conspirators  
4 committed the following overt acts among others in the  
5 Southern District of New York and elsewhere:

6 "One: In October 1973 Gordon M. Saks  
7 and Marcus George Hero prepared an SBA loan application  
8 for North State Packing Company, Inc.

9 "Two: On or about October 22, 1973,  
10 Gordon M. Saks caused said SBA loan application to be  
11 signed.

12 "Three: On or about January 11, 1974,  
13 Gordon M. Saks posing as George Saunders signed an SBA  
14 compensation agreement.

15 "Four: On or about February 5, 1974,  
16 Gordon M. Saks posing as George Saunders attended the  
17 loan closing for North State at 26 Federal Plaza, New  
18 York, New York and received approximately \$42,000 in  
19 checks drawn to fictitious payees previously furnished  
20 as creditors of North State.

21 "Five: On or about February 22, 1974,  
22 Gordon M. Saks gave Marcus George Hero \$6,000 in the  
23 vicinity of Second Avenue and 48th Street, New York,  
24 New York."

25 Now, in defining the elements of conspiracy

*HGS*

1 qjw 6

1633

2 I have used the words knowingly and wilfully. A person  
3 acts knowingly if he acts voluntarily and intentionally  
4 and not because of mistake or accident or other innocent  
5 reasons. The purpose of adding the word knowingly was  
6 to insure that no one would be convicted for an act done  
7 because of mistake or accident or other innocent reason .

8           A person acts wilfully if he acts voluntarily  
9 and intentionally and with the specific intent to do some-  
10 thing the law forbids, that is to say with a purpose  
11 either to disobey or disregard the law.

12           Those then are the three essential elements  
13 necessary to establish a conspiracy. First, that the  
14 conspiracy existed as charged in the indictment. Second,  
15 that the defendant knowingly and wilfully joined the con-  
16 spiracy. Third, that one of the conspirators knowingly  
17 and wilfully committed at least one of the overt acts set  
18 forth in the indictment.

19

20           As I told you, before you may find the defendant  
21 guilty of the conspiracy count you must be satisfied  
22 that the government has established each of these elements  
23 by proof beyond a reasonable doubt.

24           We are a little bit further along than half-  
25 way in my instructions but before continuing I thought

A66

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 qjw 7

1634

2 it might be advisable to take a short break at this time.  
3 I am giving you an awful lot of law that you are absorbing  
4 here in a short period of time but I am going to instruct  
5 you now as I have throughout the trial not to discuss  
6 the case. You have only heard a part of the instructions  
7 on the law and I still must charge you on the remaining  
8 counts of the indictment and several general principles  
9 of law that are applicable to all the counts of the  
10 indictment.

11 So please continue the conscientious work  
12 you have done so far. In a short while I will have  
13 completed my charge and the case will be submitted to  
14 you for your consideration.

15 (Jury left the courtroom)

16 THE COURT: All right, gentlemen, ten minutes.  
17 Anything that you can think of?

18 MR. GOTKIN: One thing, your Honor.

19 Costa was not an unindicted co-conspirator.  
20 You said he was. He is not.

21 MR. WILSON: I think you misspoke yourself.  
22 You said Costa one time and you should have said Her<sup>n</sup>.  
23 I think it was obvious from the context you should have  
24 said Hero. That is the only time I can recall Costa's  
25 name.

A67

2 THE COURT: I don't recall.

3 MR. GOTKIN: I thought your Honor said --

4 THE COURT: No, RePass and Catale are un-  
5 indicted co-conspirators.

6 MR. GOTKIN: You said Costa also.

7 THE COURT: All right.

8 I will charge them on the substantive counts  
9 and reasonable doubt and those principles.

10 MR. WILSON: If we are not doing the Mini  
11 conspiracy, I believe that Catale would not come in as  
12 an unindicted co-conspirator. It would be relevant  
13 for similar acts, other conspiracies but not the one  
14 being charged.

15 THE COURT: That is correct.

16 Do you think there ought to be any limiting  
17 instructions?

18 MR. GOTKIN: I am sorry?

19 THE COURT: Since the indictment involving  
20 Catale has been dismissed he is technically not an un-  
21 indicted co-conspirator although I think his testimony  
22 was that he was an unindicted co-conspirator. Do you  
23 want anything on that?

24 MR. GOTKIN: I think I would like the jury  
25 be made aware that that count again was --

A68

2 THE COURT: I think they have been made  
3 aware that that has been dismissed. There is no doubt  
4 about it.

5 Do you have any request in that respect?

6 MR. GOTKIN: No, your Honor, not at this  
7 point.

8 THE COURT: All right, ten minutes, gentle-  
9 men.

10 (Recess)

11 (In open court - jury present)

12

13 THE COURT: That concludes, as I told you  
14 before my charge with respect to the conspiracy counts  
15 and the law makes conspiracy a separate and distinct  
16 offense from any substantive offenses that are alleged  
17 to be the object of the conspiracy.

18 Count 2 of 74 Crim 1951, that is the Modern  
19 Century indictment, and Count 2 of the Mini Enterprises  
20 indictment, and Counts 2 and 3 of the North State indict-  
21 ment are the substantive counts involved which I will  
22 discuss with you at this point.

23 Each of these counts charges a violation  
24 of Section 1001 of Title 18, United States Code. That  
25 section reads as follows:

A69

2                 "Whoever in any matter within the jurisdiction  
3         of any department or agency of the United States knowingly  
4         and wilfully falsifies, conceals or covers up by any  
5         trick, scheme or device a material fact or makes any  
6         false, fictitious or fraudulent statements or representa-  
7         tions or makes or uses any false writing in a document,  
8         knowing the same to contain any false, fictitious or  
9         fraudulent statement or entry commits a crime."

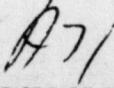
10                You will observe that this section makes it  
11         a crime to knowingly and wilfully in a matter within the  
12         jurisdiction of any agency or department within the  
13         United States, one, to falsify, conceal or cover up by  
14         any trick, scheme or device a material fact, or, two,  
15         make a false statement, or, three, use a false writing  
16         or document in a matter.

17                Specifically Count 2 of 74 Crim. 1051, that  
18         is the Modern Century indictment reads as follows:

19                "The grand jury further charges on or about  
20         October 20, 1972 in the Southern District of New York  
21         in a matter within the jurisdiction of a department, an  
22         agency of the United States, to wit, the United States  
23         Small Business Administration, Leonard Randell, Gerald  
24         Devins, Marcus George Hero and Gordon M. Saks, the  
25         defendants, unlawfully, wilfully and knowingly did falsify,

A70

2 conceal and cover up and cause to be falsified, concealed  
3 and covered up by trick, scheme and device material  
4 facts and did make and cause to be made false, fictitious  
5 and fraudulent statements and representations and did  
6 make and cause to be made and use and cause to be used  
7 false writings and documents knowing the same to contain  
8 false, fictitious and fraudulent statements and entries  
9 in that the defendants Leonard Randell, Gerald Defins  
10 and Marcus George Hero submitted and caused to be sub-  
11 mitted to the United States Small Business Administration  
12 an application for a \$350,000 loan by Modern Century  
13 Company, Inc. hereinafter Modern to be guaranteed by the  
14 United States Small Business Administration in which it  
15 was represented that Modern possessed current assets  
16 consisting of \$500,000 worth of prepaid advertising time,  
17 that Modern possessed current assets consisting of  
18 \$90,557 worth of inventory and that no attorney, account-  
19 ant, appraiser, agent or any party engaged by or on  
20 behalf of Modern had received or was to receive any fee  
21 or other charge or compensation for the purpose of render-  
22 ing professional or other services of any nature for or  
23 in connection with the preparation or presentation of said  
24 loan application when in truth and in fact, as the defend-  
25 ants then and there well knew, said statements and documents  
were untrue."



t4/1 pm 2 Count 2 of indictment 1055, that is the Mini  
3 Enterprises indictment, reads as follows:

4 "The grand jury further charges:

5 "On or about November 22, 1972, in the Southern  
6 District of New York, in a matter within the jurisdiction  
7 of a department and agency of the United States, to wit,  
8 the United States Small Business Administration, Marcus  
9 George Hero, Gerald Devins and Leonard Randell, the defend-  
10 ants, unlawfully, wilfully and knowingly did falsify,  
11 conceal and cover up, and cause to be falsified, concealed  
12 and covered up, by truck, scheme and device, material  
13 facts, and did make and cause to be made false, fictitious  
14 and fraudulent statements and representations and did make  
15 and cause to be made and use and caused to be used false  
16 writings and documents knowing the same to contain false,  
17 fictitious and fraudulent statements and entries, in that  
18 the defendants Marcus George Hero, Gerald Devins and  
19 Leonard Randell submitted and caused to be submitted to  
20 the United States Small Business Administration, an  
21 application for a \$350,000 loan by Mini Enterprises, Inc.,  
22 of 230 Park Avenue, New York, New York, (hereinafter  
23 Mini), to be guaranteed by the United States Small  
24 Business Administration in which it was represented that  
25 Mini had been engaged in extensive research into the effects

A72

1 arbr 2

2 of giving up smoking and had developed a diet-aid pill;  
3 that the total amount of shareholders' equity and net  
4 worth in Mini as shown on a balance sheet dated as of  
5 September 30, 1972 was \$79,000; and that no attorney,  
6 accountant, appraiser, agent or any party engaged by or  
7 on behalf of Mini had received or was to receive any fee,  
8 or other charge or compensation whatever for the purpose of  
9 rendering professional or other services of any nature  
10 whatever in connection with the preparation or presentation  
11 of said loan application, when in truth and in fact as  
12 the defendant then and there well knew said statements  
13 and documents were untrue."

14 Counts 2 and 3 of said indictment Criminal 1053,  
15 which is the North State Packing indictment reads as  
16 follows:

17 "The grand jury further charges:

18 "On or about October 22, 1973 in the Southern  
19 District of New York, in a matter within the jurisdiction  
20 of a department and agency of the United States, to wit:  
21 The United States Small Business Administration, Marcus  
22 George Hero and Gordon M. Saks, also known as George Saunders  
23 the defendants, unlawfully, wilfully and knowingly did  
24 falsify, conceal and cover up, and cause to be falsified,  
25 concealed and covered up, by trick, scheme and device

A73

1 arbr 3

2 material facts, and did make and cause to be made false,  
3 fictitious and fraudulent statements and representations  
4 and did make and cause to be made and use and cause to be  
5 used false writings and documents knowing the same to  
6 contain false, fictitious and fraudulent statements and  
7 entries, in that the defendants, Marcus George Hero and  
8 Gordon M. Saks also known as George Saunders submitted  
9 and caused to be submitted to the United States Small  
10 Business Administration, an application for a \$50,000 loan  
11 from the United States Small Business Administration in  
12 which it was represented that, among other things,  
13 North State Packing Company Inc. had been engaged in the  
14 slaughter of hogs; had entered into a contract with  
15 Thousand Island Hog Breeders for the purchase of animals;  
16 and that as of September 30, 1973 had a net worth or total  
17 stockholders equity of \$16,250 when in truth and in fact,  
18 as the defendants then and there well knew, said statements  
19 and documents were untrue."

20 Count 3 of that indictment reads as follows:

21 "The grand jury further charges:

22 "On or about January 11, 1974, in the Southern  
23 District of New York, in a matter within the jurisdiction  
24 of a department and agency of the United States, that is,  
25 the United States Small Business Administration, Marcus George

A74

1 arbr 4

2 Hero, and Gordon M. Saks also known as George Saunders,  
3 the defendants, unlawfully, wilfully and knowingly did  
4 falsify, conceal and cover up, and cause to be falsified,  
5 concealed and covered up, by truck, scheme and device  
6 material facts and did make and cause to be made false,  
7 fictitious and fraudulent statements and representations  
8 and did make and cause to be made and use and caused to  
9 be used false writings and documents knowing the same to  
10 contain false, fictitious and fraudulent statements and  
11 entries in that the defendants Marcus George Hero and  
12 Gordon M. Saks submitted and caused to be submitted to the  
13 United States Small Business Administration, a statement  
14 that no attorney, accountant, appraiser, agent or any party  
15 engaged by or on behalf of North State Packing Company,  
16 Inc. was to receive any fee, or other charge or compen-  
17 sation for the purpose of rendering professional or other  
18 services of any nature for or in connection with the  
19 preparation or presentation of its application for a  
20 \$50,000 loan from the United States Small Business  
21 Administration, when in truth and in fact, as the defendants  
22 then and there well knew said statements were untrue."

23  
24 Now, you may not find the defendant guilty of the crimes  
25 charged unless you are satisfied that the government has

A75

1 arbr

1643

2 proved each of the following elements beyond a reasonable  
3 doubt:

4 One, on or about the date specified the  
5 defendant by trick, scheme or device, concealed or covered  
6 up or caused to be concealed or covered up a statement  
7 or representation or used a writing or document.

8 Two, the facts concealed or covered up were  
9 material or the statements or representations were false,  
10 fictitious or fraudulent or the writings or documents  
11 contained a false, fictitious or fraudulent statement or  
12 entry.

13 Three, the cover-up or concealment was done  
14 knowingly and wilfully; or the false, fictitious or  
15 fraudulent statement was made knowingly and wilfully;  
16 or the defendant knew the writing or document contained  
17 a false, fictitious or fraudulent statement or entry;

18 Four, the concealment or coverup or the statement  
19 or representation was made; or the writing or document  
20 was used in a matter within the jurisdiction of a department  
21 or agency of the United States.

22

23

24

25

A76

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 arbr 6  
2

3 Now, I have indicated to you this fourth element  
4 is concealment or cover-up; or the statement or representa-  
5 tion or the writing or document be made or used in a matter  
6 within the jurisdiction of a department or agency of the  
7 United States. I charge you as a matter of law that the  
8 Small Business Administration is an agency of the United  
9 States. If you find that the defendant concealed or  
10 covered up material facts or made statements or representations  
11 to or submitted writings or documents to the Small Business  
12 administration, then this fourth element is satisfied.

13 A statement is false or fictitious if it is untrue  
14 and made and known to be untrue by the person making or  
15 causing this to be made. A statement or representation  
16 is fraudulent if known to be untrue and made or caused to  
17 be made with the intent to deceive the government agency  
18 to whom submitted.

19 The word false must be considered together with  
20 the words knowingly and wilfully. You will recall that in  
21 connection with the conspiracy count I explained what is  
22 generally meant by the term "knowingly and wilfully."  
23 I think it is appropriate for me to give you a further  
24 explanation of that term as it is used in the context  
25 of this statute.

1 arbr 7

2 A person acts "knowingly" if he acts voluntarily  
3 and intentionally, and not because of mistake or accident  
4 or other innocent reason.

5 The purpose of adding the word "knowingly" was  
6 to insure that no one would be convicted for an act done  
7 because of mistake, or accident, or other innocent reason.

8 A person acts "wilfully" if he acts voluntarily and  
9 intentionally, and with the specific intent to do something  
10 the law forbids; that is to say, with bad purpose either  
11 to disobey or to disregard the laws.

2 As to materiality, if you find that by trick,  
3 scheme or device facts were concealed or covered up you  
4 must then find that these facts were material. In determin-  
5 ing whether the facts concealed were material, the test  
6 is whether the concealment of those facts had a natural  
7 effect or tendency to influence the Small Business  
8 Administration with respect to assuming an obligation to  
9 either lend money or to guarantee the repayment of money  
10 lent by banks.

21 However, it is not necessary for the government  
22 to prove that the false statements or false writing or  
23 documents relate to a fact which is material to the decision  
24 of the Small Business Administration. Nor is it necessary  
25 for the government to prove that the Small Business

A78

1 arbr 8

2 Administration did in fact rely on the false statement  
3 or representation or writing or document.

4 Now, Count 3 of 74 Crim. 1051, Modern Century,  
5 and Count 3 of 1055, Mini Enterprises, charge a violation  
6 of Section 1014 of Title 18, United States Code which  
7 reads in pertinent part as follows:

8 "Whoever knowingly makes any false statement  
9 or report for the purpose of influencing in any way the  
10 action of any bank the deposits of which are insured  
11 by the Federal Deposit Insurance Corporation upon any  
12 application or loan (commits a crime)"

13 Count 3 of indictment 74 Crim. 1051 reads  
14 as follows:

15 "The grand jury further charges:

16 "On or about October 20, 1972, in the Southern  
17 District of New York, the defendants, Leonard Randell,  
18 Gerald Devins, Marcus George Hero and Gordon M. Saks,  
19 unlawfully, wilfully and knowingly did make and cause to be  
20 made a false statement and report for the purpose of  
21 influencing the action of Underwriters Bank & Trust Company  
22 (since renamed United America's Bank), a bank, the deposits  
23 of which were then insured by the Federal Deposit Insurance  
24 Corporation, upon an application and loan for \$350,000  
25 by Modern Century Company, Inc. (hereinafter Modern), in that

A79

1 arbr 9

2 the defendants represented and caused to be represented  
3 to said bank that Modern possessed current assets consisting  
4 of \$500,000 of prepaid television advertising time, that  
5 Modern possessed current assets consisting of \$90,557  
6 of inventory, and that no attorney, accountant, appraiser,  
7 agent or any party engaged by or on behalf of Modern had  
8 received or was to receive any fee or other charge or  
9 compensation for the purpose of rendering professional  
10 or other services of any nature whatever for or in con-  
11 nection with the preparation or presentation of said loan  
12 application, when, in truth and in fact, as the defendants  
13 then and there well knew, said representations were  
14 untrue.

15 Now, Count 3 of 74 Crim. 1055 reads as follows:

16 "The grand jury further charges:

17 "On or about October 31, 1972, in the Southern  
18 District of New York, the defendants Marcus George Hero,  
19 Gerald Devins, Leonard Randell, unlawfully, wilfully  
20 and knowingly did make and cause to be made a false statement  
21 and report for the purpose of influencing the actions  
22 of Underwriters Bank & Trust Company (since renamed United  
23 America's Bank), a bank the deposits of which were then  
24 insured by the Federal Deposit Insurance Corporation, upon  
25 an application and loan for \$350,000 by Mini Enterprises,

A80

1 arbr 10

2 Inc. (hereinafter Mini) in that defendants represented  
3 or caused to be represented to said bank that no attorney,  
4 accountant, appraiser, agent or any party engaged by or on  
5 behalf of Mini had received or was to receive any fee,  
6 or other charge or compensation whatever for the purpose  
7 of rendering professional or other services of any nature  
8 whatever in connection with the preparation or presentation  
9 of said loan application when in truth and in fact as the  
10 defendant then and there well knew said representations  
11 were untrue.

12 You may not find the defendant guilty of false  
13 statements as charged in Count 2 of indictment 74 Crim. 1051  
14 and 1055 unless you are satisfied that the government has  
15 proved as to each count, each of the following elements  
16 beyond a reasonable doubt:

17 One. That the defendant either made or caused  
18 to be made, a false statement or report upon or in an  
19 application for a loan.

20 Two. That the defendant knew the statement or  
21 report to be false.

22 Three. That the statement or report was made  
23 in a loan application to a bank, deposits of which were  
24 then insured by the Federal Deposit Insurance Corporation.

25 Four. That the false statement or report

1 arbr 11

2 was made for the purpose of influencing the bank's action  
3 on the loan application.

4           The essence of the crime is the making of a  
5 false statement in an application for a loan for the  
6 purpose of influencing in any way the action of the bank  
7 from which the loan is sought.       The law focuses specifically  
8 on the application for the loan.

9           The statute does not require proof that the  
10 bank officials relied upon the alleged false statements  
11 or made a loan to the defendant.

12           So, too, it is of no consequence whether any  
13 part or all of a loan which might have been made was  
14 subsequently paid back.

15           The statute has nothing whatsoever to do with  
16 defrauding the bank or whether or not the bank is actually  
17 defrauded.   In other words, whether the false statements  
18 accomplished the purpose intended is irrelevant.

19           The fact that no pecuniary losses may have been  
20 suffered is not relevant under this law.

21           Also, it is not necessary for the government to  
22 prove that the defendant knew that the bank to which the  
23 loan application was submitted was insured by the Federal  
24 Deposit Insurance Corporation, but rather the proof only  
25 need show that the defendant knew that it was a bank which

1 arbr 12

2 he intended to influence.

3 You are instructed that both sides have stipulated  
4 that the Underwriters Bank & Trust Company was insured  
5 by the Federal Deposit Insurance Corporation.

6 You will recall in my instructions to you on  
7 false statements to the Small Business Administration  
8 I defined knowingly and wilfully. You are instructed  
9 that my definition of that element applies with equal  
10 force to the offense of making false statements to a  
11 bank.

12 There is no sense in repeating it here again.

13 With regard to the substantive counts of  
14 the indictments, the government relies upon a statute  
15 which reads in relevant part as follows:

16 "Whosoever commits an offense or aids, abets or  
17 counsels, commands, induces or procures its commission,  
18 is punishable as a principal."

19 This means that not only is the person who actually  
20 commits an illegal act the principal, punishable, but anyone  
21 who aids and abets him in committing that illegal act is  
22 likewise punishable.

23 Accordingly, you may find the defendant guilty  
24 of the offense charged if you find beyond a reasonable doubt  
25 that the offense was committed and that the defendant aided

A83

1 arbr 13

2 and abetted in its commission.

3 To aid and abet does not mean just knowing that  
4 a crime is being committed, even if one is present during  
5 its commission. That alone is not sufficient. In order  
6 to find that a defendant aided and abetted another to  
7 commit a crime, you must be satisfied beyond a reasonable  
8 doubt that he knowingly, in some substantial measure,  
9 associated himself with the venture, that he participated in  
10 it as something he wished to bring about, that he sought by  
11 his action to make it succeed.

12 In other words, if one, fully aware of what he is  
13 doing, plays a significant role in facilitating a trans-  
14 action prohibited by law, he is equally guilty with the  
15 person who directly performs the illegal acts, even though  
16 the latter played a greater or much larger role in the  
17 perpetration of the crime.

18 The evidence of a defendant's participation may  
19 be circumstantial, from which you may conclude that a  
20 defendant, as an aider and abettor, was a participant in the  
21 crime charged. A single act may come within the prohibition  
22 of the aiding and abetting law.

23 Whether one aided and abetted another to commit  
24 a crime must be determined solely upon the alleged aider  
25 and abettor's own conduct, acts and statements.

1 arbr 14

2 This concludes my charge as to the specific  
3 offenses charged in the indictment. Before sending you  
4 to your deliberations, there are a few more general com-  
5 ments I must make.

6 You have heard me use on a number of occasions  
7 here the term reasonable doubt. I told you at the beginning  
8 of my charge that a defendant was presumed innocent and  
9 that the presumption of innocence remains with a defendant  
10 unless and until the jury is unanimously satisfied of  
11 guilty beyond a reasonable doubt. In describing the  
12 elements of the various offenses charged in the indictment  
13 I told you that the government must establish each of those  
14 elements by proof beyond a reasonable doubt.

15 The question naturally arises, what is a  
16 reasonable doubt. The words almost define themselves:  
17 That there is a doubt founded in reason and arising out  
18 of the evidence or lack of the evidence. It is a doubt  
19 which a reasonable person has after carefully considering  
20 all the evidence.

21 A reasonable doubt is not a vague or speculative  
22 or imaginary doubt. It is not caprice, whim or speculation.  
23 It is not an excuse to avoid the performance of an unpleas-  
24 ant duty. It is not sympathy for a defendant.

25 A reasonable doubt is a doubt which appeals to

A85

1 arbr 15

2 your reason, your common sense, your experience and your  
3 judgment. It is a doubt which would cause a reasonable  
4 man or woman, like yourselves, to hesitate to act in  
5 relation to your own important private affairs.

6 Mere suspicion will not justify conviction.

7 Suspicion is not a substitute for evidence nor is it  
8 sufficient to convict if you find that the circumstances  
9 merely render an accused probably guilty.

10 On the other hand, it is not required that the  
11 government must prove guilt beyond all possible doubt,  
12 but the proof must be of such convincing character that  
13 you would be willing to rely and act on it in the important  
14 affairs of your own life.

15 In sum, a reasonable doubt exists whenever,  
16 after a fair and impartial consideration of all the evidence  
17 before you, you can candidly and honestly state that you  
18 do not have an abiding conviction that the defendant is  
19 guilty of the charge.

20 During my explanation of the charges in these  
21 indictments I have used the words "knowledge" and  
22 "intent" as an element of the crime. An act or failure to  
23 act is knowingly done if it is done voluntarily and in-  
24 tentionally and not because of mistake or other innocent  
25 reason.

A84

1 arbr 16

2 Further comment may be helpful in your deliber-  
3 ations.

4 Knowledge and intent exist in the mind. As we  
5 all realize it is not possible to look into a man's mind  
6 to see what went on. Therefore, the only way you have for  
7 arriving at a decision in these questions is for you to  
8 take into consideration all the facts and circumstances  
9 shown by the evidence, and to determine from all such  
10 facts and circumstances whether the requisite knowledge and  
11 intent were present at the time in question. Direct proof  
12 is unnecessary. Knowledge and intent may be inferred from  
13 all the surrounding circumstances.

14 You may consider in determining whether the  
15 defendant acted with guilty knowledge or intent, the fact,  
16 if you find it true, that the defendant engaged in other  
17 transactions similar to those charged in the indictment.  
18 You are to consider such evidence on the question of knowledge  
19 and wilfulness.

20 You will note in this respect that when we started  
21 out you also had before you the Smoke Watchers application,  
22 that there was testimony adduced here with respect to  
23 other matters that are not charged in an indictment such  
24 as the Clayton Camper, Cheung's Garden or several others.  
25 There is no need to review it. But several others were

A87

2 brought to your attention here. Those were adduced  
3 here or admitted solely on the question of similar acts.  
4 Now, I must of course give you a limiting instruction with  
5 respect to the evidence attended on the area of offenses  
6 of like nature.

7 The fact, if it is a fact that the accused may  
8 have committed an offense at another time is not any evidence  
9 or proof whatever that at a later time the accused committed  
10 the offense charged in the indictments, even though both  
11 offenses are of a like nature. Evidence as to an alleged  
12 earlier offense of a like nature may not therefore be  
13 considered by the jury in determining whether the accused  
14 did the act charged in the indictment. Nor may such evi-  
15 dence be considered for any other purpose whatever, unless  
16 the jury first find that other evidence in the case,  
17 standing alone, established beyond a reasonable doubt that  
18 the accused did the act charged in the indictment.

19 If the jury should find beyond a reasonable doubt  
20 from other evidence in the case that the accused did the  
21 act charged in the indictment, then the jury may consider  
22 evidence as to an alleged earlier offense of a like nature,  
23 in determining the state of mind or intent with which the  
24 accused did the act charged in the indictment.  
25 And where all the elements of an alleged earlier offense

1788

1 arbr 18

2 of a like nature are established by evidence which is  
3 clear and conclusive, the jury may, but it is not obliged to,  
4 draw the inference and find that in doing the act  
5 charged in the indictment the accused acted wilfully and  
6 with specific intent, and not because of mistake or accident  
7 or other innocent reason.

8 That is solely the basis upon which other acts  
9 of a similar nature were presented to you.

10 Now, intent and motive should never be confused.  
11 Motive is what prompts a person to act, or fail to act.  
12 Intent refers only to the state of mind with which the  
13 act is done or omitted.

14 I charge you that proof of motive is not a  
15 necessary element of the crimes with which the defendant  
16 is charged. Proof of motive does not establish guilt,  
17 nor does want of proof of motive establish that a defendant  
18 is innocent.

19 So the presence or absence of motive is immaterial  
20 except as a circumstance which the jury may consider as  
21 bearing on the defendant's state of mind or intent.

22 Now, I indicated to you at the very commencement  
23 of the trial that one of your most important functions  
24 would be to access the credibility of the witnesses who  
25 testified. You, as jurors, are the sole judges of the

2 credibility of the witnesses; you and you alone must  
3 determine what weight their testimony deserves. In my  
4 instructions to you at the start of the case I gave you  
5 some guidelines I thought might be helpful to you as you  
6 listened to the testimony. I am going to repeat and  
7 expand on those instructions at this point.

8 Preliminarily, you are to understand that you  
9 should not be influenced by the mere number of witnesses  
10 called by either side. The weight of the evidence is  
11 not necessarily determined by the number of witnesses  
12 testifying on either side. Rather, you should consider  
13 all the facts and circumstances in evidence to determine  
14 where the truth lies.

15 In assessing credibility, you should carefully  
16 scrutinize the testimony given, the circumstances under  
17 which each witness has testified, and every matter in evidence  
18 which tends to indicate whether the witness is worthy of  
19 belief.

20 The degree of credit to be given a witness should  
21 be determined by his demeanor, his relationship to the  
22 controversy and the parties, his bias or impartiality,  
23 the reasonableness of his statements, the strength or weak-  
24 ness of his recollection viewed in the light of all other  
25 testimony and the attendant circumstances in the case and

AJD

1 arbr 20

1658

2 the extent to which, if at all, each witness is either  
3 supported or contradicted by other evidence.

4 How did the witness impress you? Did his  
5 version appear straightforward and candid, or did he try  
6 to hide some of the facts? Is there a motive to testify  
7 falsely?

8 In passing upon the credibility of a witness,  
9 you may take into account inconsistencies or contradictions  
10 as to material matters in his own testimony, or any conflict  
11 with that of another witness, also any inconsistencies or  
12 omissions in prior testimony or any prior statement of material  
13 matters as to which he may have testified upon the trial.  
14 Inconsistencies or discrepancies in the testimony of a  
15 witness, or between the testimony of different witnesses,  
16 may or may not cause the jury to discredit such testimony.

17

18

19

20

21

22

23

24

25

AGH

T5pm  
Charge  
USvHero

1 JOjw 1

1659

2 Two or more persons witnessing an incident  
3 or a Franz action may see or hear it differently. An  
4 innocent misrecollection like failure of recollection  
5 is not an uncommon experience. A witness may be in-  
6 accurate, contradictory or untruthful in some respects  
7 and yet be entirely credible in the essentials of his  
8 testimony.

9 In weighing the effect of a discrepancy  
10 consider whether it pertains to a matter of importance  
11 or an unimportant detail and whether the discrepancy  
12 results from innocent error or wilful falsehood.

13 If you find that any witness has testified  
14 falsely you can do one of two things, you can either reject  
15 all of that witness' testimony on the ground that it is  
16 all tainted by falsehood and that none of it is worthy  
17 of belief or you can accept that part which you believe  
18 to be credible and reject only that part which you believe  
19 to be tainted by falsehood.

20 Should you find that all or part of a par-  
21 ticular witness' testimony was false you may not infer  
22 that the opposite of that testimony is the truth unless  
23 there is no other evidence to that effect. Any testimony  
24 rejected by you as false is no longer in the case insofar  
25 as any finding that you may make is concerned.

AJS

1 qjw 2

2 You will recall that I told you that an  
3 inference was a conclusion which reason or common sense  
4 leads you to draw from the facts which you find have  
5 been proved. Thus a finding of fact may not be established  
6 merely by a negative inference arising from your disbelief  
7 and rejection of any testimony.

8 In passing upon credibility the ultimate  
9 question for you to decide is, did the witness tell the  
10 truth here before you. It is for you to say whether  
11 his testimony at this trial is truthful in whole or in  
12 part in the light of his demeanor, his explanations and  
13 all the evidence in the case.

14 Of course these instructions of mind cannot  
15 be taken by you in a vacuum. They are to be applied as  
16 the evidence has been developed here and as the circum-  
17 stances have developed. In assessing credibility you  
18 may take into consideration a prior conviction of a  
19 witness and you may or may not consider evidence that  
20 the witness has in the past been convicted of certain  
21 crimes in determining that witness' credibility.

22 While prior convictions may be a factor  
23 affecting credibility it by no means follows that the  
24 witness is for that reason necessarily untruthful.

25 AG3

2 Prior convictions are just one of the number of factors  
3 which may be considered when you determine that person's  
4 credibility.

5 As I have said before and will say again in  
6 a moment or two and now, the ultimate question always  
7 is, did the witness testify truthfully before you.  
8

9 In connection with credibility I want to  
10 bring to your attention one of the rules of this court  
11 which relates to the testimony of an accomplice.  
12

13 An accomplice is one who unites with another  
14 person in the commission of a crime voluntarily and with  
15 common intent. During the course of this trial Gordon  
16 Saks, Richard RePass testified before you. Saks was  
17 named as a co-defendant. RePass, although not named as  
18 a defendant was alleged to have been a co-conspirator.  
19

20 In connection with 74 Crim. 1054 which is no  
21 longer before you Sal Catale was named as a co-conspirator.  
22

23 MR. WILSON: 1055.  
24

25 THE COURT: Yes, 1055.

26 In another indictment, Richard RePass I did  
27 say was named as a co-conspirator. Whether or not Carolyn  
28 Ugiss, Sylvia Bailey, Nicholas Costa were considered co-  
29 conspirators or accomplices is for you to determine.  
30

31 From the prosecution of crime the government

AGH

2 is frequently called upon to use witnesses who are  
3 accomplices. Sometimes it has no choice. The govern-  
4 ment must rely upon witnesses to transactions such as  
5 they are. Under federal law there is no requirement that  
6 the testimony of an accomplice be corroborated. A con-  
7 viction may rest upon the uncorroborated testimony of an  
8 accomplice if you believe it and find it credible.

9                 However, the testimony of an accomplice  
10 should be viewed with great caution and scrutinized  
11 carefully. In assessing the credibility of an accomplice  
12 as with that of any witness you may consider any interest  
13 in the outcome that the witness may have in the case.

14                 You may consider evidence as to any benefit  
15 the witness expects to derive or has derived from his  
16 testimony or evidence as to a motive to place responsibility  
17 on others.

18                 In this connection you have heard the testi-  
19 mony of Catale, Costa and RePass and I am not going over  
20 it, and Ugiss and Bailey as to whatever understand or  
21 expectations they might expect to get by reason of their  
22 testifying here or their cooperation with the government.

23                 If you find that the testimony of an alleged  
24 accomplice was deliberately untruthful you should un-  
25 hesitatingly reject it. On the other hand, upon a cautious



2 and careful examination you are satisfied that such  
3 witnesses here have given a substantially truthful  
4 version of events to which they testified, such testi-  
5 mony should be given an appropriate consideration together  
6 with all the other evidence in the case in determining  
7 the guilt or innocence of the defendant.

8 As always the ultimate question in passing  
9 upon the credibility of a witness is after taking into  
10 account all factors that may affect his testimony, did  
11 he testify truthfully before you as to events to which  
12 he testified.

13 Now you will recall further in connection  
14 with credibility that during the course of his testimony  
15 at this trial both Gordon Saks and Sal Catale admitted  
16 lying to a government agent. The testimony of an admitted  
17 liar should be considered with caution and weighed with  
18 great care. You may decide for example that an admitted  
19 liar is unbelievable or conversely you may accept his  
20 testimony.

21 As always the question is, did the witness  
22 testify truthfully before you and as always the question  
23 of credibility is for you and you alone to decide.

24 I told you at the outset that the law does  
25 not require a defendant in a criminal case to testify or

A96

2 present any evidence in his behalf. When, as here, a  
3 defendant does testify it is your function as jurors to  
4 assess his credibility in the same manner as you assess  
5 the credibility of any other witness.

6 You will recall I instructed you that one  
7 factor to be considered in judging credibility was any  
8 interest a witness may have in the outcome of the trial.  
9 Obviously every defendant has a personal interest in the  
10 outcome of the case.

11 In appraising his credibility you may take  
12 the fact of interest into consideration. However, it by  
13 no means follows that simply because a person has a sub-  
14 stantial interest in the result he is not capable of  
15 telling a straightforward or truthful story. It is for  
16 you to decide to what extent if at all his interest has  
17 affected his testimony.

18 The government has introduced evidence,  
19 including tape conversations of statements made by the  
20 defendant. The government contends that the defendant  
21 by these statements has admitted certain facts. The  
22 defendant concedes he has made certain statements but he  
23 offered an explanation to show that he did not admit the  
24 facts as claimed by the government.

25 You may accept either party's version of the

AGT

1 qjw 7

1665

2 statements in whole or in part or may accept a portion  
3 of the versions given by both. In determining the weight  
4 to be given to such statements if any as you find were  
5 made, you will take into consideration all the circum-  
6 stances and conditions existing at the time and place  
7 and the other facts in evidence as well as the reasonableness  
8 of the explanation of the statements now offered by the  
9 defendant.

10 You may consider the statements as evidence  
11 of the truth of the facts you may find were admitted.  
12 You may ignore the statements all together or you may  
13 attribute to them a weight between these two extremes  
14 as you find proper under all the circumstances.

15 The defendant has offered evidence of good  
16 general reputation for truth and veracity which should  
17 be considered by you along with the other evidence in the  
18 case. Evidence of a defendant's reputation inconsistent  
19 with those traits of character ordinarily involved in the  
20 commission of the crime charged may give rise to a  
21 reasonable doubt, since you may think it improbable that  
22 a person of good character in respect to those traits  
23 would commit a crime.

24 Evidence of good reputation may in itself  
25 create a reasonable doubt where without such evidence no

AS8

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 qjw 8

1666

2 reasonable doubt would exist.

3                   Absent witnesses. If it is peculiarly within  
4 the power of either the prosecution or the defense  
5 to produce a witness who could give material witness on  
6 an issue in the case the failure to call that witness may  
7 give rise to an inference that his testimony would have  
8 been unfavorable to that party and I charge you as a  
9 matter of law that the employees of the Small Business  
10 Administration employed by the government were under  
11 the control and in the employ of the government.

12                  The failure to call a witness may give rise  
13 to an inference that that witness' testimony would have  
14 been unfavorable to that party. However, no such conclusion  
15 should be drawn by you with regard to a witness who is  
16 equally available to both parties or where the witness'  
17 testimony would be merely cumulative.

18                  Both sides have the right to interview witnesses  
19 at any time before or during the trial. Both sides have  
20 the right to subpoena or request witnesses to appear in  
21 court. The jury will also bear in mind that the law never  
22 imposes upon a defendant in a criminal case the burden  
23 or duty of calling any witnesses or producing any evidence.

24                  In your deliberations please do not discuss  
25 the question of possible punishment. That is a matter

ASG

1 gjw 9

1667

2 that rests on my conscience and my conscience alone  
3 because the judge and the judge alone is the one who has  
4 the obligation of imposing sentence when and if guilt  
5 is determined.

6           If you do discuss it among yourselves then  
7 you are encroaching upon my function and I ask you not to  
8 do it. Your function is to consider the facts and to  
9 determine the facts and my function is to pass upon the  
10 law and in the event of conviction to impose sentence.

11           If you find on all the evidence that the  
12 evidence respecting this defendant leaves a reasonable  
13 doubt as to his guilt you should not hesitate for a  
14 moment to return a verdict of not guilty as to the defendant.

15           However, on the other hand, if you find  
16 beyond a reasonable doubt that the law has been violated  
17 as charged, you should not hesitate because of sympathy  
18 or because of any other reason to render a verdict of  
19 guilty. You are here to determine the guilt or innocence  
20 of this defendant from the evidence in this case. You  
21 are not called upon to return a verdict as to the guilt  
22 or innocence of any other person or persons.

23           So if the evidence in the case convinces you  
24 beyond a reasonable doubt of the guilt of the accused you  
25 should so find even though you may believe one or more

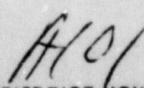
A/jos

2 other persons are also guilty. But if a reasonable  
3 doubt remains in your mind after impartial consideration  
4 of all the evidence in the case it is your duty to find  
5 the defendant not guilty.

6 The verdict must represent the considered  
7 judgment of each juror. In order to return a verdict  
8 it is necessary that each juror agree thereto. That is  
9 your verdict must be unanimous. It is your duty as  
10 jurors to consult with one another and to deliberate  
11 with a view to reaching an agreement if you can do so  
12 without violence to individual judgment.

13 Each of you must decide the case for yourself  
14 but do so only after an impartial consideration of the  
15 evidence with your fellow jurors. In the course of your  
16 deliberations do not hesitate to re-examine your own  
17 views and change your opinion if convinced that it is  
18 erroneous. But do not surrender your honest conviction  
19 as to the weight or effective evidence solely because of  
20 the opinion of your fellow jurors or for the mere purpose  
21 of returning a verdict. You are not partisans. You are  
22 judges. Judges of facts. Your sole interest is to  
23 ascertain the truth from the evidence in the case.

24 If it becomes necessary during your delibera-  
25 tions to communicate with the Court you may send a note



1 qjw 11

1669

2 by the marshal signed by your foreman or by one or more  
3 members of the jury. No member of the jury should ever  
4 attempt to communicate with the Court by any means other  
5 than a signed writing and the Court will never communicate  
6 with any member of the jury on any subject touching the  
7 merits of the case otherwise than in writing or orally  
8 here in open court.

9 You will note from the oath soon to be taken  
10 by the marshal that he too as well as all other persons  
11 are forbidden to communicate in any way or manner with  
12 any member of the jury on any subject touching the merits  
13 of the case. Bear in mind also that you are never to  
14 reveal to any person, not even to the Court, how the jury  
15 stands numerically or otherwise on the question of the  
16 guilt or innocence of the defendant unless and until after  
17 you have reached a unanimous verdict.

18 You have a right to have any of the exhibits  
19 or any of the evidence that you wish reread to be done  
20 so. There will be given to you a form of verdict as well  
21 as I indicated to you before the charges that are pending  
22 before you and the form of verdict reads as follows:

23 "On Count 1 of 74 CR 1051 we find the  
24 defendant" and the place is blank. When you come back  
25 and report you tell us what verdict it is. All the other

A/02

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 qjw 12

1670

2 counts follows. That is how you report your verdict  
3 when you come back here.

4 It is proper that I add a word of caution  
5 that nothing said in these instructions, nothing in the  
6 form of the verdict prepared for your convenience is to  
7 suggest or convey in any way or manner any intimation  
8 as to what verdict I think you should find. What the  
9 verdict shall be is the sole and exclusive duty and  
10 responsibility of you members of the jury. That com-  
11 pletes my instructions.

12 Counsel have the obligation of taking any  
13 exceptions or making any additional requests where they  
14 think I have not fully covered the charge to you here.  
15 I will take those requests here at the side bar.

16 (At the side bar)

17 MR. GOTKIN: The defendant has no exceptions,  
18 your Honor.

19 THE COURT: Mr. Wilson?

20 MR. WILSON: Yes, your Honor. First of  
21 all, I believe you misspoke yourself, you said aiding and  
22 abetting and you said produced instead of procured when  
23 you were reading the statute. I think the word is procure.  
24 You might have misspoke yourself.

25 THE COURT: What should it be?

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUITUNITED STATES OF AMERICA,  
Appellee,

Index No.

- against -

MARCUS GEORGE HERO,  
Defendant- Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
1027 Avenue St. John, Bronx, New York

That on the 20th day of January 1976 at 1 St. Andrews Plaza, New York, New York

deponent served the annexed appendix upon

THOMAS J. CAHILL

the Attorney in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 20th  
day of January 19 76

VICTOR ORTEGA

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977



1201 181 1001 00000000000000000000000000000000

1201 181 1001 00000000000000000000000000000000

1201 181 1001 00000000000000000000000000000000

1201 181 1001 00000000000000000000000000000000

1201 181 1001 00000000000000000000000000000000

1201 181

1201 181

1201 181

